

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 139

JOSEPH ESTIN, PETITIONER,

vs.

GERTRUDE ESTIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT**

GERTRUDE ESTIN, Plaintiff-Respondent-Appellant,
against

JOSEPH ESTIN, Defendant-Appellant-Respondent

STATEMENT UNDER RULE 234

This is an appeal from an order and judgment entered in the office of the Clerk of the County of Queens on July 9th, 1946, as resettled on August 12th, 1946. A motion was made by the Plaintiff-Respondent upon an order to show cause dated the 20th day of February, 1946, for an order directing that judgment be entered against the Defendant-Appellant for accrued and unpaid alimony under the judgment entered in the office of the Clerk of Queens County on the 14th day of October, 1943, and for a counsel fee. The Defendant-Appellant moved by affidavit and notice of motion, returnable the 3rd day of April, 1946, for an order amending the aforementioned judgment herein by striking therefrom all provisions for the payment of money by the Defendant-Appellant to the Plaintiff-Respondent for her support and maintenance. Both motions were heard and decided simultaneously.

The Plaintiff-Respondent appeared by Roy Guthman, Esq.

The Defendant-Appellant appeared by Wing & Wing, Esqs.

[fol. 2] There has been no change of parties to the action.

The Plaintiff-Respondent now appearing by Roy Guthman, Esq., formerly appeared in the action by Edward C. Morsch, Esq., and the Defendant-Appellant now appearing by Wing & Wing, Esqs., formerly appeared by Mitchell Salem Fisher, Esq.

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

NOTICE OF APPEAL BY DEFENDANT

SIRS:

Please Take Notice that the defendant hereby appeals to the Appellate Division of the Supreme Court for the Second Judicial Department from the Order herein as resettled by the Order of this Court dated August 12th, 1946, denying the motion of the defendant to modify a Judgment of Separation herein, and granting the motion of the plaintiff for Judgment for purported arrears of alimony in the sum of [fol. 3] \$2,441.90, which said Judgment was entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946, and that the defendant appeals from each and every part of said Order and Judgment.

Dated: New York, N. Y., August 21, 1946.

Yours, etc., Wing & Wing, Attorneys for Defendant,
Office & P. O. Address, 225 Broadway, Borough of
Manhattan, City of New York.

To Roy Guthman, Esq., Attorney for Plaintiff, Office &
P. O. Address, 11 West 42nd Street, Borough of Manhattan,
City of New York, Clerk of the County of Queens.

[fol. 4] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

NOTICE OF APPEAL BY PLAINTIFF

SIRS:

Please take notice that the above named plaintiff, Gertrude Estin, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from so much and such part of the order and judgment of this Court herein, as re-settled by the order of this Court dated August 12th, 1946, denying the motion of the defendant to modify a Judgment of separation herein,

and granting the motion of the plaintiff for Judgment for arrears in the payment of her support and maintenance in the sum of \$2441.90, which said Order and Judgment was entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946; as finds, and adjudges,

(a) That the Second Judicial Court of the State of Nevada in and for the County of Washoe, had jurisdiction on May 24th, 1944, or at any other time, to render a judgment of divorce in favor of the defendant herein, Joseph Estin, and against the plaintiff herein, Gertrude Estin, and finds and adjudges that said divorce obtained by the husband in Nevada was jurisdictionally efficacious to dissolve the marital status of the parties.

(b) As fails to find and adjudge that the judgment of the Supreme Court of the State of New York, Queens County, [fol. 5] entered herein on October 13th, 1943, which grants to the plaintiff a separation and an allowance of \$180 per month for her support and maintenance is a final judgment and is entitled to full faith and credit in all of the Courts of the State of New York and is not subject to collateral attack and that therefore defendant's motion herein to modify said judgment of separation should have been dismissed for that reason:

And from such parts only, and the plaintiff does not appeal from any other part of said judgment.

Dated, New York, N. Y., August 29, 1946.

Yours, etc., Roy Guthman, Attorney for Plaintiff,
Office & P. O. Address, No. 11 West 42nd Street,
New York 18, N. Y.

To the Clerk of the County of Queens, Messrs. Wing & Wing, Attorneys for Defendant, 225 Broadway, New York 7, N. Y.

[fol. 6] At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Queens, at the General Court House, in Sutphin Boulevard, Jamaica, Queens County, on the 12th day of August, 1946.

Present: Hon. James T. Hallinan, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

RE-SETTLED ORDER AND JUDGMENT APPEALED FROM

Upon reading and filing the annexed stipulation, dated July 18, 1946, signed by the attorneys for the parties hereto, and the Affidavit of James G. Purdy, sworn to July 24th, 1946, it is

Ordered that the Order and Judgment of this Court, dated the 2nd day of July, 1946, and entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946, is hereby resettled to read as follows:

[fol. 7] At a Special Term, Part I, of the Supreme Court of the State of New York held in and for the County of Queens at the General Court House in Sutphin Boulevard, Jamaica, Queens County, on the 2nd day of July, 1946.

Present: Hon. James T. Hallinan, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

A Judgment having been duly made and entered herein on the 11th day of October, 1943, directing among other things, the payment by defendant to plaintiff of the sum of One Hundred and Eighty (\$180.00) Dollars per month for her support and maintenance and it appearing that the said defendant has made default in the payment of the sums of money required to be paid by the said judgment and the plaintiff having made application for an order directing the entry of a judgment for the amount of such

arrears, with interest, together with an application for an additional reasonable allowance of counsel fees to defray the expense of collecting any judgment for arrears of payments of support and maintenance, to pay plaintiff's counsel for services in preparing the Order to Show Cause, affidavits and exhibits attached thereto and for the argument [fol. 8] of same in Court; and an order having been granted on the 20th day of February, 1946, in this Court, requiring the defendant to show cause why such relief should not be granted, and having been returned with proof of due service thereof, and on reading and filing the affidavit of Gertrude Estin, verified the 16th day of February, 1946, and the Exhibits A, B, B1, B2 and C thereto annexed and upon reading the judgment roll in the above entitled action heretofore filed herein, and upon reading all the proceedings and papers heretofore had and filed herein, the Order to Show Cause and the proof of service thereof; in support of said application; and the affidavit of George S. Wing, one of the attorneys for the defendant herein, verified March 29th, 1946, and the affidavit of Joseph Estin verified March 19th, 1946; and the copy of the affidavit of Lloyd V. Smith verified March 19th, 1946; the affidavit of Marjorie De Val verified March 1st, 1946; and Exhibits 1, 1A, 2, 3, 4, 5, 6, 7, 8, 9 and 10 attached to said affidavits, on behalf of the defendant, in opposition to said application; and the defendant by his attorneys Wing and Wing, having served on the plaintiff herein on the 26th day of March, 1946, a Notice of Motion herein for an Order amending the Judgment herein by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance and for such other and further relief as may be just and proper, returnable on April 3rd, 1946, at the same time as the aforesaid Order to Show Cause herein is made returnable and after reading [fol. 9] and filing said Notice of Motion by the defendant and the affidavit of Joseph Estin verified March 19th, 1946; the affidavit of Lloyd V. Smith verified March 19th, 1946; the affidavit of Marjorie De Val verified March 1st, 1946; the affidavit of George S. Wing verified March 25th, 1946, together with Exhibits 1, 1A, 2, 3, 4, 5, 6, 7, 8, 9 and 10 attached to the said affidavits on behalf of the defendant, in support of the motion and on reading and filing the affidavit of Gertrude Estin verified April 12th, 1946, and the

affidavit of Gertrude Estin also verified on the 12th day of April, 1946, and the affidavit of Roy Guthman, verified April 12th, 1946, in opposition to the said motion of the defendant, and after reading and filing the affidavit of James G. Purdy verified April 16th, 1946, in support of said motion and in reply to the said affidavits of Gertrude Estin verified April 12th, 1946, as aforesaid.

And the said Order to Show Cause on behalf of the plaintiff and the said motion on behalf of the defendant having come on to be heard before me in Special Term, Part I, of this Court on the 17th day of April, 1946, and after hearing Roy Guthman, Esq., of Counsel, for the plaintiff in support of said Order to Show Cause and in opposition to said motion on behalf of the defendant and James G. Purdy, Esq., of Counsel for the defendant in opposition to said Order to Show Cause and in support of the said Motion on behalf of the defendant and due deliberation having been had, and after filing the opinion of the Court, now on Motion of Roy Guthman, Esq., attorney for the plaintiff, it is

[fol. 10] Ordered that the motion on behalf of the plaintiff be and it is hereby granted, and it is further

Ordered that this order be entered as a judgment in the office of the Clerk of the County of Queens, State of New York, for the amount of arrears, to wit, the sum of \$2,340, being the arrears for thirteen months at \$180.00 per month from May, 1945, to and including June, 1946, together with interest thereon at 6% to the date of this order amounting to \$81.90, that is, for the total amount of \$2,421.90, together with Ten Dollars (\$10.00) costs and disbursements, and it is further

Ordered that the motion on behalf of the defendant to modify the judgment of separation rendered by this Court so as to eliminate the provisions therein for the plaintiff's support is in all respects denied together with Ten Dollars (\$10.00) motion costs and disbursements to the plaintiff, and it is further

Ordered that the plaintiff be and hereby is allowed a counsel fee in connection with these proceedings in the sum of \$250.00 payable in ten (10) days after service of a copy of this order on defendant's attorneys, and that judgment be entered herein for Two Thousand Four Hundred Forty

[fol. 11] One and 90/100 (\$2,441.90) Dollars, and the plaintiff have Execution therefor.

Enter

James T. Hallinan, J. S. C.

Granted July 2, 1946. Paul Livoti, Clerk.

Order entered July 9th, 1946 at 9:50 A. M. Paul Livoti, Clerk.

Enter.

James T. Hallinan, J. S. C.

Granted Aug. 12, 1946. Paul Livoti, Clerk.

[fol. 12] At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Queens at the General Court House of Queens County, on Sutphin Boulevard in Jamaica, New York, on the 20th day of February, 1946.

Present: Hon. Henry G. Wenzel, Jr., Justice.

[Same Title]

ORDER TO SHOW CAUSE

On the affidavit of Gertrude Estin, verified on the 16th day of February, 1946, and upon the judgment of this Court entered on the 14th day of October, 1943, herein and upon all the papers and proceedings heretofore filed and had herein,

Let, Joseph Estin, the defendant above named, show cause before this Court, at a Special Term, Part I thereof, to be held in and for the County of Queens, at the General Court House in Jamaica, Queens Borough, New York City, on the 15th day of March, 1946, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made directing the entry of judgment for the amount of \$1,620.00 arrears in the payment of the sums of money with interest required to be paid by the defendant above named under the judgment of this Court made and entered on the 11th day of October, 1943, and why the plaintiff should not have an additional allowance for counsel fees, and why the plaintiff should not have

[fol. 13] such other and further relief as to the Court may seem just and proper together with the costs of this order to show cause.

Let the defendant or his attorney serve copies of the answering affidavits on the plaintiff's attorney five days before the return day of this Order to Show Cause.

Sufficient cause appearing therefor, let service of this order and the affidavit upon which it is granted, upon the defendant by delivering true copies thereof upon Mitchell Salem Fisher, Esq., attorney of record for the defendant herein and attorney in fact for the defendant, for the purpose of receiving service of process and other notice in connection with this above entitled cause of action, under contract dated March 16th, 1943, between the above named plaintiff; the defendant; the said Mitchell Salem Fisher, Esq., and Edwin C. Morsch, Esq.; on or before the 28th day of February, 1946, be considered sufficient service.

Enter.

H. G. W., Jr., J. S. C.

Granted Feb. 21, 1946. Paul Livoti, Clerk.

[fol. 14] IN SUPREME COURT OF NEW YORK

County of Queens

[Same Title]

AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO FEBRUARY 16, 1946,
READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:

GERTRUDE ESTIN, being duly sworn, deposes and says:

1. That she is the plaintiff in the above entitled action.
2. That on the 11th day of October, 1943, a judgment was duly made and entered in this Court in which and by which it was provided among other things, that the defendant pay to the plaintiff the sum of One Hundred and Eighty (\$180.00) Dollars per month for her support. A true copy of said judgment is hereto annexed and made a part of this affidavit, Exhibit A.

3. That as will appear from the affidavit of Jacques J. Benjamin, verified the 27th day of October, 1943, and hereto annexed a certified copy of the said judgment was personally served upon Joseph Estin, the Defendant at 319 E. 50th Street, Manhattan, New York City, on the 27th day of October, 1943.

4. That the said defendant has made default in paying the sums of money as required by the said judgment, directing the payment thereof as aforesaid and has failed to pay [fol. 15] the sum of \$180.00 required to be paid on the fifth days of the months of June, July, August, September, October, November and December, of the year 1945 and the months of January and February, 1946, leaving the amount of Sixteen Hundred and Twenty (\$1,620.00) Dollars due at the date of this affidavit.

5. That the defendant paid to the plaintiff the amount of \$180.00 per month regularly until January, 1944, when the defendant through his attorney herein, Mitchell Salem Fischer, Esq., informed the plaintiff that the defendant did not intend to pay to the plaintiff any more alimony under the judgment of this Court entered herein on October 11, 1943; that thereafter the plaintiff collected the monthly payments of alimony of \$180.00 per month, from a fund of \$1,250.00 established by a written contract entered into on or about March 16th, 1943, by and between the plaintiff and the defendant and their respective attorneys herein, a copy of which contract is hereto annexed marked Exhibit B; that the plaintiff collected the amount of \$180.00 per month from such fund for each month up to and including July, 1944, when she collected the amount of \$170.00 and exhausted the fund. That on or about January 12th, 1945, the deponent, plaintiff in this action, procured an order to show cause of this Court, signed by Mr. Justice Peter Daly, requiring the defendant or his attorney, Mitchell Salem Fisher, Esq., to show cause why a money judgment for \$910.00, arrears of alimony, should not be entered herein and that on or about [fol. 16] January 25th, 1945, and upon the argument of said order to show cause the defendant, through his said attorney, paid the amount of \$910.00, with interest; that on or about March 15th, 1945, and March 23rd, 1945, the deponent, plaintiff, procured another order to show cause herein why a money judgment should not be entered herein against the defendant for the sum of \$720.00, arrears of alimony, together with an additional allowance of counsel

fees; that on April 9th, 1945, and before the return day of said order to show cause the defendant, through his attorney, Mitchell Salem Fisher, Esq., paid to the plaintiff the sum of \$820.00, the said amount of \$720.00 arrears of alimony plus \$100.00 an agreed amount by defendant for additional counsel fees.

Deponent further says that by said contract entered into by the plaintiff and defendant and their respective attorneys on March 16, 1943, Exhibit B (and by contracts dated April 1, 1943, and April 17, 1943, Exhibits B' and B'' all executed by the same parties, modifying and confirming the first contract dated March 16, 1943, as to the depository of the said fund of \$1,250.00) the defendant designates his attorney Mitchell Salem Fisher, Esq., as his agent to receive service of process or notice of any kind whenever it is necessary to enforce any right of the plaintiff under the judgment of this Court. That by letter dated April 3rd, 1944, Exhibit C, mailed to the plaintiff's attorney by the defendant's attorney, the defendant sought to revoke the said power of attorney under said contract to receive process [fol. 17] and notice for him in this case; that the plaintiff is informed and verily believes, that, as appears from said contracts, Exhibits B, B' and B'' that the plaintiff has a material and valuable interest in said contracts, that the same were entered into to protect the plaintiff as to the collection of any award of alimony which would be granted her by this Court, that the power of attorney contained in said contracts designating the said Mitchell Salem Fisher, Esq., as agent for the defendant to receive service of process and notice herein, is a power of attorney coupled with an interest and is therefore irrevocable; that the notice mailed by the defendant's attorney purporting to revoke said power was mailed a few days after the said attorney had informed the plaintiff, as aforesaid, that the defendant did not intend to make any further payments of alimony under the judgment and decree of this Court and was done for the purpose of hindering and delaying and impeding the plaintiff in the collection of her alimony herein.

Deponent further says that she will be put to great expense to procure and enter a money judgment herein, to procure an exemplified copy of such judgment, under the act of Congress, and to send such exemplified copy of such judgment to the Western State where defendant is now residing and to collect the amount of such judgment; plaintiff is informed and believes that the fee she will be required

to pay for collecting such judgment will be at least twenty-five (25%) per cent of the sum of money collected, which [fol. 18] does not include the amount she will have to pay to her counsel for preparing this order to show cause and voluminous affidavits and exhibits, for the argument of same and the necessary counsel work in connection therewith; that plaintiff believes that \$750.00 is a fair and reasonable amount of counsel fees which she will be required to pay; that the amount she mentions and asks for is for services in connection with present order to show cause and services necessarily to be incurred in collecting any judgment rendered, and not for any past services, or to reimburse her for any counsel fees heretofore paid out by her; that, upon reliable information and belief the defendant is well able to pay the amount of arrears of payments of maintenance of plaintiff required to be paid by him by the judgment of this Court entered herein on October 11th, 1943, together with the amount of additional counsel fees asked for; that defendant left New York in or about November, 1943, with \$150,000.00 which he realized from the sale of his interest in the Eastern Castings Corporation of 542 West 27th Street, Manhattan, New York City, and including several thousand dollars of bonds which defendant then owned; that the source of plaintiff's information is a confidential report which she had made by and secured from Proudfoot's Commercial Agency, 70 Pine Street, Manhattan, New York City; that the defendant, through his attorney, admits that he secured \$50,000.00 for his share of the said Eastern Castings Corporation at the time or just before he left New [fol. 19] York City; that by the payment of \$100.00 as counsel fees by the defendant through his attorney on April 9th, 1945, as aforesaid, before the argument of an order to show cause, the defendant and his attorney admit and show that they recognize the justice and propriety of plaintiff's demand for additional counsel fees.

Deponent further says, upon information and belief, that the defendant, Joseph Estin, has removed from the State of New York and is now in California or Nevada.

6. That no previous application has been made for the relief sought herein.

7. That an order to show cause is asked for herein by reason of the fact that Section 1171b of the Civil Practice Act requires that this application be upon such notice to the defendant as the Court may direct, and defendant is

desirous that the Court shall make such direction by means of any order to show cause.

8. That the plaintiff, applicant herein, asks that the defendant by his attorney be required to serve copies of his answering affidavits, intended to be used in opposition to this order to show cause, upon the plaintiff's attorney five days before the return day of this order to show cause and for that reason asks that the order to show cause be made returnable fifteen or more days from its date.

(Sworn to by Gertrude Estin, Feb. 16, 1946.)

[fol. 20] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

Index No. M 712. Year 1943.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Queens, at the Court House, Jamaica, County of Queens, State of New York, on the 11th day of October, 1943.

Present: Hon. Peter M. Daly, Justice.

GERTRUDE ESTIN, Plaintiff,
against

JOSEPH ESTIN, Defendant

This action having been duly brought on for a judgment of separation because of the wilful abandonment of the plaintiff by the defendant, and the summons and certified complaint having been duly served on the defendant personally within the State of New York, and twenty days having elapsed since the said service, and the defendant having appeared by Mitchell Salem Fisher, as attorney, and not having answered although his time to do so has fully expired and has not been extended by the court or otherwise, and the plaintiff having applied to the Court at a Special Term thereof held in and for the County of Queens on the 3rd day of May, 1943, for judgment for the [fol. 21] relief demanded in the complaint, and the court having, by its order, referred the matter to Hon. James C. Van Sieten, Official Referee, to hear and report with Findings of Fact and Conclusions of Law and the trial of the issues so referred having heretofore been had before the

said Official Referee and said Official Referee having duly made and filed his report with Findings of Fact and Conclusions of Law,

Now, on motion of Mitchell Salem Fisher, attorney for the defendant, it is hereby

Ordered that said report of Hon. James C. Van Sielen, Official Referee, be and the same hereby is confirmed, ratified and approved in all respects and it is further

Adjudged that the plaintiff, Gertrude Estin, be and she hereby is separated from the bed and board of the defendant, Joseph Estin, because of the wilful abandonment of said plaintiff by said defendant, and it is further

Ordered, adjudged and decreed that the defendant, Joseph Estin pay to the plaintiff, Gertrude Estin, for her support and maintenance, the sum of \$180 per month.

Enter

Peter M. Daly, J.S.C.

Granted, October 11, 1943. Paul Livoti, Clerk.

[fol. 22] Judgment entered October 14, 1943, 10:20 A. M.

Paul Livoti, Clerk.

Certificate of Clerk No. 8735

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this day of Oct. 21, 1943.

Paul Livoti, Clerk.

SUPREME COURT, QUEEN'S COUNTY

Index No. M. 712/1943

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

STATE OF NEW YORK,

County of New York, ss:

Jacques J. Benjamin, being duly sworn, deposes and says that he is over the age of 21 years and resides at 6440-99th Street, Forest Hills, N. Y.

That on the 27th day of October, 1943 at 319 East 50th Street, New York, N. Y., he served the annexed Judgment of Separation upon Joseph Estin, defendant in this action, [fol. 23] by delivering to and leaving with said Joseph Estin a certified copy thereof.

Deponent further says, that he knew the person so served as aforesaid to be the person mentioned and described in the said Judgment of Separation as the defendant herein.

Deponent is not a party to the action.

Jacques J. Benjamin.

Sworn to before me this 27th day of October, 1943.
John H. Kay, Notary Public, Nassau Co. No. 850.

EXHIBIT B, ANNEXED TO FOREGOING AFFIDAVIT OF GERTRUDE
ESTIN

SUPREME COURT, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

Whereas, the plaintiff has instituted this action against the defendant for a decree separating the plaintiff from [fol. 24] the bed and board of the defendant forever and providing that the defendant provide suitably out of his estate and income for the support and maintenance of the plaintiff, and further providing for the payment of attorney's fees by the defendant; and

Whereas, the summons and complaint herein, together with an order to show cause dated February 5, 1943, upon a motion for temporary alimony and counsel fee, were heretofore served upon the defendant on the 5th day of February, 1943; and

Whereas, the defendant has appeared in this action by his attorney, Mitchell Salem Fisher, but has not served an answer; and

Whereas, the aforesaid motion for alimony and counsel fee has been adjourned from time to time; and

Whereas, the parties hereto are desirous of agreeing upon the amount which shall be considered suitable for

the support and maintenance of the plaintiff by the defendant, and of agreeing further upon the amount of counsel fee to be paid by the defendant for the services of the plaintiff's attorney herein,

Now, Therefore, it is hereby stipulated and agreed as follows:

1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the court:

[fol. 25] (a) That the defendant shall pay to the plaintiff the sum of \$180.00 per month as alimony for the support and maintenance of the plaintiff herein.

(b) That the defendant shall pay the sum of \$500.00 as the reasonable counsel fee of Edwin C. Morsch, attorney for the plaintiff for his services herein.

2. That the aforesaid sum of \$180.00 per month permanent alimony shall commence as of the first day of March, 1943.

3. That the aforesaid sum of \$500.00 counsel fee shall be paid simultaneously with the signing of this stipulation.

4. In the event that the plaintiff herein at any time hereafter shall institute an action for divorce, the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action.

5. That the defendant hereby consents that if such decree of separation is entered herein, it shall contain a provision, subject to the approval of the court:

That the defendant be restrained and enjoined from leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff, in any other State [fol. 26] or foreign country, and enjoining and restraining the defendant from thereupon instituting any such action for divorce against the plaintiff in any such jurisdiction other than the State of New York, except that the foregoing shall not apply in the event that the plaintiff shall establish her residence outside of the State of New York.

6. That the defendant shall, prior to or simultaneously with the delivery of this stipulation, properly executed, deposit the sum of \$1250 with the firm of Guggenheimer & Untermeyer, 30 Pine Street, New York City, to be deposited by them in their client's trust account with Bankers Trust Company, 16 Wall Street, New York City, and held by them as security upon the following conditions:

In the event that the plaintiff makes and delivers to said firm an affidavit setting forth:

(a) that the defendant has defaulted for five days in the payment of any sum provided by this stipulation to be paid by the defendant;

(b) the calendar months of said default and the amounts thereof;

(c) that the affidavit is made knowing that said firm shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 E. 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

(e) the amount required by the plaintiff to pay any ex-[fol. 27] penses incurred by her for counsel fees, traveling expenses, incidental disbursements or other expenses of any kind whatsoever made necessary by such violation;

said firm shall deliver to the plaintiff out of said \$1250 the amount necessary to satisfy such default within five days after the delivery to said firm of said affidavit, until said fund is exhausted. Said firm shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of said \$1250 within five days after the delivery to it of said affidavit.

In the event that the plaintiff makes and delivers to said firm an affidavit setting forth

(a) that the defendant has violated the terms of paragraph 5 of this stipulation;

(b) the facts upon which said violation is asserted;

(c) that the affidavit is made knowing that said firm shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th

Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

said firm shall deliver to the plaintiff the amount stated in said affidavit as necessary for such requirement within five days after the delivery to said firm of said affidavit. Said firm shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and [fol. 28] shall have no other duty to either of the parties except to make payment out of the said \$1250 within five days after the delivery to it of said affidavit.

7. In the event that such decree of separation is entered herein, the terms of this stipulation, shall, subject to the approval of the Court, be incorporated and merged in such decree.

8. No costs shall be awarded to either party as against the other upon the entry of any such decree.

9. Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under such decree, if entered, it becomes necessary for the plaintiff to obtain the services of any process or paper or notice of any kind upon the defendant, the defendant hereby appoints his attorney, Mitchell Salem Fisher, Esq. of 30 Pine Street, New York City, as his agent and attorney-in-fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot, with reasonable diligence, be found within the City of New York.

Dated: March 16, 1943.

(Signed) Edwin C. Morsch, Attorney for plaintiff.
Gertrude Knudsen Estin, Plaintiff in person.
Mitchell Salem Fisher, Attorney for defendant.
Joseph Estin, Defendant in person.

The deposit of \$1250 is herewith acknowledged and is to be held in accord with the above stipulation.

[fol. 29] EXHIBIT B1, ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

SUPREME COURT, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

Whereas, the parties to this action have heretofore and on March 16, 1943, entered into a stipulation wherein it is provided for the payment of certain sums of money by the defendant to the plaintiff and for other matters therein set forth; and

Whereas, the said stipulation contains a provision that the sum of \$1250.00 shall be deposited in escrow with the firm of Guggenheimer & Untermeyer, 30 Pine Street, New York City, subject to certain terms and conditions thereunto attaching; and

Whereas, it has been found to be inconvenient to deposit said sum of money with the aforementioned firm; and

Whereas, the parties hereto have agreed upon a different depository and escrow agent and another mode of making said deposit,

Now, therefore, it is hereby stipulated and agreed as follows:

1. That this stipulation shall be considered as an addition [fol. 30] to and an amendment of and constitute a part of the aforementioned stipulation dated March 16, 1943.

2. The sum of \$1250.00 mentioned in the aforementioned stipulation shall be deposited in escrow with Mitchell Salem Fisher, Esq., of 30 Pine Street, New York City, and Edwin C. Morsch, Esq., of 155-31 Jamaica Avenue, Jamaica, New York, the respective attorneys for the defendant and the plaintiff herein, in a joint account, and be held by them as security upon the following conditions:

In the event that the plaintiff makes and delivers to each of said escrow agents a duplicate original affidavit setting forth

(a) that the defendant has defaulted for five days in the payment of any sum provided by this stipulation to be paid by the defendant;

(b) the calendar months of said default and the amounts thereof;

(c) that the affidavit is made knowing that said escrow agents shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

said escrow agents shall deliver to the plaintiff out of said \$1250.00 the amount necessary to satisfy such default within five days after the delivery to said escrow agents of said affidavit, until said fund is exhausted. Said escrow agents [fol. 31] shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of said \$1250.00 within five days after the delivery to them of said affidavit.

Delivery of said affidavit may be by registered mail to the addresses of the respective escrow agents hereinabove set forth.

In the event that the plaintiff makes and delivers to said escrow agents duplicate original affidavits setting forth

(a) that the defendant has violated the terms of paragraph 5 of this stipulation;

(b) the facts upon which said violation is asserted;

(c) that the affidavit is made knowing that said escrow agents shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

(e) the amount required by the plaintiff to pay any expenses incurred by her for counsel fees, traveling expenses, incidental disbursements or other expenses of any kind whatsoever made necessary by such violation; said escrow agents shall deliver to the plaintiff the amounts stated in said affidavit as necessary for such requirements within five days after the delivery to said escrow agents of said duplicate original [fol. 32] affidavit. Said escrow agents shall not be under any duty to inquire with respect to the facts and circum-

stances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of the said \$1250.00 within five days after the delivery to each of said escrow agents of said affidavit.

3. The plaintiff and the defendant shall have the right at any time respectively to nominate a new escrow agent on her or his behalf, that is the plaintiff may nominate a new escrow agent in place of stead of Edwin C. Morsch, and the defendant may nominate such new escrow agent in place and stead of Mitchell Salem Fisher; such nominations of a new escrow agent to be made by sending a registered letter, return receipt requested, to each of said escrow agents at the addresses hereinabove given, stating the name of the new escrow agent, whereupon the name of such new agent shall be substituted in the place and stead of the old escrow agent upon such account. Such new or substitute escrow agent shall be an attorney at law of the State of New York, and shall have an office for the practice of law within the City of New York.

4. The aforesaid sum of \$1250.00 shall be deposited in Jamaica Savings Bank, at 161-02 Jamaica Avenue, Jamaica, New York, in the joint names of the aforementioned escrow agents and subject to withdrawal by their joint signatures only. It is understood and agreed that the amount of interest which shall be credited by the aforementioned bank to the aforementioned account shall be paid to the afore-[fol. 33] mentioned escrow agent as and for their compensation for service as such escrow agents.

5. In all other respects the original stipulation dated March 16, 1943, shall remain in full force and effect and shall be construed together with this stipulation so that both stipulations shall constitute one instrument.

Dated: April 1, 1943.

Edwin C. Morsch, Attorney for Plaintiff. Gertrude Estin, Plaintiff in person. Mitchell Salem Fisher, Attorney for Defendant. Joseph Estin, Defendant in person.

G. E., E. C. M., M. F., J. E.

The deposit of \$1250.00 is herewith acknowledged and is to be held in escrow in account with the above stipulation.
Dated April 8, 1943.

Edwin Morsch, Mitchell Salem Fisher.

[fol. 34] STATE OF NEW YORK,
County of New York, ss:

On this 1st day of April, 1943 before me personally appeared Gertrude Estin, to me known and known to me to be the person described in and who executed the foregoing stipulation, and she acknowledged to me that she executed the same.

Abraham Lynn Dubinbaum, Notary Public, Bronx Co.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of April, 1943, before me personally appeared Joseph Estin, to me known and known to me to be the person described in and who executed the foregoing stipulation, and he acknowledged to me that he executed the same.

Robert J. Goldstein, Notary Public, New York.
G.E., E. C. M., M. F., J. E.

[fol. 35] EXHIBIT B2 ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

April 12, 1943.

Edwin C. Morsch, Esq., 155-31 Jamaica Avenue, Jamaica,
New York, and
Mitchell Salem Fisher, Esq., 30 Pine Street, New York, N. Y.

DEAR SIRs:

You have advised us that on April 8, 1943 when you sought to deposit the \$1250.00 paid under the stipulations of March 16, 1943 and April 1, 1943, the Jamaica Savings Bank would not accept the deposit unless, in the event of the death of one of you, the survivor would be able to withdraw the entire amount.

Since that arrangement was not in accord with the understanding, you thereupon advised that you deposited the said \$1250.00 in a joint account, without right of survivorship, in the Queens County Federal Savings and Loan Association of Jamaica; that said account number is #11339 and that a notice that two signatures are required, has been placed on the account.

We do hereby and each of us consent to the change in the deposit from the Jamaica Savings Bank to said Queens County Federal Savings and Loan Association of Jamaica, it being understood that the terms of the stipulations as to this \$1250.00 shall apply to this deposit in the Queens County Federal Savings and Loan Association of Jamaica, [fol. 36] to the same extent as if said monies had been deposited in the Jamaica Savings Bank.

Very truly yours, (Signed) Joseph Estin, Gertrude Estin.

We agree that the \$1250.00 deposited in the Queens County Federal Savings and Loan Association of Jamaica is held by us jointly in escrow without right of survivorship, pursuant to the terms of the stipulations dated March 16, 1943 and April 1, 1943.

(Signed) Mitchell Salem Fisher, Edwin C. Morsch.

EXHIBIT C ANNEXED TO FOREGOING AFFIDAVIT OF GERTRUDE ESTIN

Guggenheimer & Untermeyer

30 Pine Street, New York

April 3, 1944.

Roy Guthman, Esq., 11 West 42nd Street, New York, N. Y.

DEAR SIR:

I hereby confirm to you the advice which I gave you and [fol. 37] Mrs. Gertrude Estin at the conference at this office last week, that Mr. Estin has revoked my appointment as agent and attorney-in-fact to receive the service of any process or paper or notice of any kind.

Mr. Estin refers particularly to paragraph "9" of the stipulation dated March 16, 1943 and the supplemental stipulation dated April 1, 1943 and in particular to paragraph "9."

Mr. Estin has advised me that any such authority by me to accept any process of any kind on his behalf, whether in connection with the action in which said stipulations were signed or otherwise, has been and is revoked and cancelled.

Said revocation bears the date of February 23, 1944 and was received by me a few days thereafter.

You are advised accordingly.

Very truly yours, Mitchell Salem Fisher.

MSF:E. CC to Edwin C. Morsch, Esq., 155-31 Jamaica Avenue, Jamaica 2, N. Y. Via: Registered Mail. Via: Ordinary Mail.

[fol. 38] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GEORGE S. WING, SWORN TO MARCH 28, 1946,
READ IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:

George S. Wing, being duly sworn, deposes and says: I am an attorney at law and one of the attorneys for the defendant herein.

The defendant opposes this motion by the plaintiff for an order directing that judgment be entered against the defendant for moneys alleged to be due for alimony and for counsel fees, and the defendant has caused to be made a motion to be heard at the same time to vacate or modify the judgment of separation granted and entered on the 11th day of October, 1943, so far as same provides for the payment of alimony. Notice of such motion and affidavits have been served upon the plaintiff as of March 23, 1946, returnable April 3, 1946.

The affidavits and exhibits to be submitted in support of that motion are with very slight exceptions the same as those attached and submitted herewith. In such instances when copies of affidavits and exhibits are included in these papers, the originals thereof will be found in the moving papers submitted upon the defendant's motion.

The plaintiff asks for counsel fees. These counsel fees would appear from the plaintiff's affidavit to be largely for [fol. 39] services to be rendered in the event she obtains a judgment and is required to take the proceeding to a foreign state for the enforcement of such judgment. This is remote and speculative and the application is premature. There

is no manner of determining that any such expenses will be necessary or will be incurred and any application for such counsel fees, if such an application would at any time be warranted, must be made when such services are to be required, either to the court of this state or the foreign state to which the plaintiff states she must proceed.

Furthermore, the payment of any counsel fees, it is submitted, is excluded from consideration by the terms of the stipulation which the plaintiff makes a part of her moving papers upon this motion.

Any application for counsel fees should be denied.

(Sworn to by George S. Wing, March 29, 1946.)

[fol. 40] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JOSEPH ESTIN, SWORN TO MARCH 19, 1946, READ
IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEVADA,

County of Washoe, ss:

Joseph Estin, being duly sworn, deposes and says: I reside at the Wyn Hotel, 134 East Second Street, Reno, Nevada, and am the defendant in the above entitled action.

I have read the affidavit of Gertrude Estin, sworn to the 16th day of February, 1946, attached to and made a part of the motion papers herein. Numerous of the facts therein set forth are untrue, notable among which are those respecting my financial circumstances.

The plaintiff moves for an order directing the entry of a judgment against me for the sum of \$1,620.00, arrears in payment of sums of money with interest alleged to be due to the plaintiff under the judgment of this Court made and entered on October 11th, 1943, copy of which judgment is made a part of the moving papers herein.

Plaintiff seeks to recover judgment for the monthly payments of alimony alleged to have been due as of June 5th, 1945, and on subsequent months to and including February, 1946.

A Decree of Absolute Divorce in my favor and against Gertrude Estin, the plaintiff herein, was made and entered

on May 24th, 1945, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, [fol. 41] exemplified copy of which Decree, together with the Judgment Roll in said action, is submitted herewith and marked Exhibit 1.

The plaintiff and myself were married on July 20th, 1937, in the State of Indiana. That owing to differences, since April 14th, 1942, we have lived apart. In January, 1944, after disposing of my interest in the business with which I was connected, I left New York with the intention of going to San Francisco, California, to live. On my way to California I stopped among other places at Reno, Nevada, and becoming favorably impressed with that city as a place in which to live, I took up my residence at the Hotel El Cartez with the full intention of making Reno my permanent place of residence. Other than while upon several trips away from that city, none of which exceeded approximately two or three weeks' time, with the exception of one longer trip in the summer of 1944, I have remained continuously in Reno up to and including the present time. On November 9th, 1944, I moved to the Wyn Hotel, No. 134 East Second Street, Reno, Nevada, where I have ever since resided, and now reside.

I have been a registered voter in Washoe County, Nevada, since March 28th, 1945. Certificate of the County Clerk of Washoe County to this effect is submitted herewith and marked Exhibit 1-A. Since May 4th, 1944, I have maintained a bank account in a bank in Reno.

I prepared and filed my United States Individual Income Tax Return, for the year 1944, giving as my residence No. [fol. 42] 134 East Second Street, Reno, Nevada. For the year 1945, I likewise prepared and filed my Income Tax Return, bearing the same address. On March 14, 1945, I prepared and filed a Declaration of Estimated Income therein stating my address to be No. 134 East Second Street, Reno, Nevada. True and correct photostatic copies of the headings of these tax returns and the Declaration of Estimated Income are attached to and made a part of this affidavit, and marked Exhibits 2, 3 and 4, respectively.

On November 8th, 1944, I paid my Poll Tax and received a receipt therefor, which receipt is attached hereto and marked Exhibit 5. I likewise paid my Poll Tax for the year 1945 on January 4th, 1945, and for 1946 on January 9th,

1946, and received receipts therefor, which receipts for the respective years are attached hereto and marked Exhibits 6 and 7.

On January 4th, 1945, I paid my Personal Property Tax and received a receipt therefor from the County Assessor, and likewise on January 9th, 1946, I paid my Personal Property Tax for the year 1946, and received receipts therefor, which receipts are hereto attached and marked Exhibits 8 and 9.

In the year 1944, automobile license No. 10595, for the State of Nevada was issued to me. On January 4th, 1945, I received a renewal of such auto license as No. 3375, for the year 1945, and on January 9th, 1946, I again renewed such license as No. 1479 for the year 1946.

A statement issued by the County Assessor, dated January 9th, 1946, confirming the aforesaid statements regard-[fol. 43] ing my auto license and the other taxes paid by me is attached hereto and made a part hereof and marked Exhibit 10.

I have, ever since I took up my residence in Reno, Nevada, in January, 1944, maintained same in that City and State continuously, and it is my present intention to continue to do so in the future. My personal effects have been during that period and are now at my said place of residence, and I have, during the aforesaid time, maintained no other place of residence.

At the time I left New York with the intention of proceeding to California, and thereafter having changed my plans and taken up my domicile in Reno, Nevada, this was not done with the intent or the purpose of commencing an action for divorce against my then wife, the plaintiff herein. After having resided in Reno, Nevada, for a considerable period of time, I undertook through my attorney in New York to work out a settlement between my then wife and myself, but this was not accomplished, and it was not until I had resided in Reno for approximately 15 months, and after a settlement of the controversy appeared impossible, did I take steps to commence the action which thereafter resulted in the divorce in the Nevada Court.

The plaintiff attaches and makes a part of the moving papers a certain stipulation between the parties hereto dated March 16th, 1943, and marked Exhibit B, with two further stipulations, dated April 1st, 1943, and April 12th, 1943, marked Exhibits B' and B'' respectively, which modify

[fol. 44] or amplify the first stipulation. This stipulation reads in part as follows:

“Now, therefore, it is hereby stipulated and agreed as follows:

1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the Court;”

The stipulation then proceeds to set forth certain terms and conditions as to the rights of the respective parties.

Subsequent to the signing of this stipulation, an action for separation was commenced by the plaintiff against me, and upon my default therein the matter was submitted by the Court to an Official Referee to hear and determine and to make Findings of Fact and Conclusions of Law, which was done. As I am informed this stipulation was offered in evidence upon the hearing before the Referee.

Proposed Findings of Fact and Conclusions of Law were prepared and presented to the Referee, which included therein the various provisions which were contained in the stipulation aforesaid. The Referee struck out and declined to adopt or include in the Findings and Conclusions made by him any of those provisions contained in the stipulation, except that provision as to the amount of alimony to be paid. The Judgment which was therefore granted and entered upon the Referee's Findings of Fact and Conclusions of Law makes no provision respecting the various [fol. 45] matters contained in the stipulation, except as to the amount of alimony.

The plaintiff seeks to recover judgment for alimony payable during the month of June, 1945, and subsequent months. All of this period of time was subsequent to the granting of the judgment of divorce by the Nevada Court, and for a time after which the marital relationship had been terminated.

Wherefore, it is respectfully urged that the motion herein be denied and that the defendant have such other and further relief as to the Court may seem just and proper.

(Sworn to by Joseph Estin, March 19, 1946.)

[fol. 46] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF LLOYD V. SMITH, SWORN TO MARCH 19, 1946,
READ IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEVADA,
County of Washoe, ss:

LLOYD V. SMITH, being first duly sworn, on oath deposes and says:

That he is an attorney at law, licensed to practice in all of the Courts of the State of Nevada, and has been such since the 16th day of May, 1930; that he maintains his offices in the Byington Building, 15 West Second Street, Reno, Nevada. That he specializes in domestic relations matters and is familiar with and knows the laws of the State of Nevada having to do with divorce.

That he represented Joseph Estin, the defendant in the above-entitled action, in proceedings for divorce that were instituted in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the 17th day of April, 1945. That said action was commenced by the filing of a complaint for divorce in which Joseph Estin, the defendant herein, was named as plaintiff, and Gertrude Estin, plaintiff herein, was named as defendant. That in compliance with the laws of the State of Nevada an affidavit for publication of summons was filed on the said [fol. 47] 17th day of April, 1945, in which it was alleged that the said Gertrude Estin was not a resident of the State of Nevada, but was a resident of the State of New York, and resided at 353 West 57th Street, New York City, New York, and which affidavit for publication prayed that an order of the Court issue permitting service of process by publication. That the said Second Judicial District Court of the State of Nevada did on the 17th day of April, 1945, enter its order directing that service of process be made upon the defendant, Gertrude Estin, by publication and mailing, or in lieu thereof by due service of a copy of the summons and a certified copy of the complaint on said defendant in person, outside of the State of Nevada. That thereafter, and on the 20th day of April, 1945, personal service of a certified copy of the complaint filed and sum-

mons issued was served upon Gertrude Estin by delivering the same to her in New York City, all in compliance with the laws of the State of Nevada. That said summons directed that the said defendant, Gertrude Estin, appear within thirty days and defend the said action for divorce. That the said defendant, Gertrude Estin, did not appear within thirty days and file any pleading in said action. That on the 24th day of May, 1945, in open court, the default of the defendant for failing to answer or otherwise plead within the time permitted by law was entered, and on said day and on motion of Lloyd V. Smith, Esq., attorney for plaintiff in said divorce action, the action was set for hearing and evidence was introduced on behalf of the [fol. 48] plaintiff and the matter thereafter submitted to the Court for its consideration. That on the said day the Court, having considered the matter, made and entered its Findings of Fact and Conclusions of Law directing that Decree of Divorce be granted to the plaintiff, and on the same day the Court made and entered its Decree of Divorce dissolving the bonds of matrimony theretofore existing between the plaintiff and defendant in said action, and granting to the plaintiff, Joseph Estin, an absolute decree of divorce.

That more than six months since the entry of said Decree of Divorce on the 24th day of May, 1945, have elapsed. That the Court has lost all jurisdiction to amend, modify or set aside the said Decree of Divorce, and that the said Decree of Divorce is in all respects final and absolute.

That the proceedings had in said action for divorce were in all respects in full compliance and in pursuance with the provisions of the law of the State of Nevada.

That your affiant knows of his own knowledge that said Joseph Estin for more than one year prior to the entry of the Decree of Divorce was a resident of the State of Nevada and that since the entry of the Decree of Divorce has continued to reside in Reno, Nevada.

(Sworn to by Lloyd V. Smith, March 19, 1946.)

[fol. 49] AFFIDAVIT OF MARJORIE DeVaul, Sworn to March 1, 1946, Read in Opposition to Plaintiff's Motion

STATE OF NEVADA,

County of Washoe, ss:

MARJORIE DeVaul, being first duly sworn, on oath deposes and says:

That I own the lease on the Hotel Wyn, located at 134 East Second Street, Reno, Nevada, and am the Manager of said Hotel.

That I am personally acquainted with Joseph Estin; that I first met the said Joseph Estin on November 9, 1944, at which time he engaged accommodations at my hotel in Reno, Nevada; that since said date he has retained said accommodations and still retains said accommodations. That I do not keep an accurate check of the times and dates that Mr. Joseph Estin personally occupies said accommodations, but know of my own knowledge that he has since November 9, 1944, been present here in Reno, Nevada, and occupied said accommodations at least seventy per cent (70%) of the time. That at all times his personal possessions and property are in said accommodations. That he continually receives his mail at the Hotel Wyn in Reno, Nevada.

(Sworn to by Marjorie DeVaul, March 1, 1946.)

[fol. 50] EXHIBIT 1, Read in Opposition to Plaintiff's Motion

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

COMPLAINT—Filed April 17, 9:11 A.M. '45. E. H. Beemer, Clerk, by B. Buchanan, Deputy

Comes now the above named plaintiff and complaining of the defendant for cause of action against,

and divorce from, defendant, alleges and avers as follows:

I

That the plaintiff is now, and for more than six weeks immediately preceding the commencement of this action has been, an actual bona fide resident of the State of Nevada, and during all of said time has been actually, physically and corporally present in said State, and still is, and during all of said time has had his actual residence and home in said State and took up his residence and home with an intention to remain permanently, which intention continued during all of said time, and still continues, and plaintiff still [fol. 51] resides in said State aforesaid; and that the said plaintiff is now domiciled in the State of Nevada, with an intention to make his permanent home in said State for an indefinite period of time.

II

That plaintiff and defendant were married in the City of Crown Point, Indiana, on the twentieth day of July, 1937, and ever since said date have been, and now are, husband and wife.

III

That there are no children the issue of said marriage.

IV

That there is no community property belonging to the plaintiff and the defendant in the State of Nevada, or elsewhere.

The Supreme Court in and for the State of New York, County of Queens, did, on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof.

[fol. 52]

V

That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day

of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation.

Wherefore, plaintiff prays judgment:

1. That the bonds of matrimony now existing between plaintiff and defendant be dissolved and that each of the parties to this action be restored to the status of single persons and that plaintiff be granted an absolute decree of divorce from defendant.

Lloyd V. Smith, Attorney for Plaintiff.

STATE OF NEVADA,

County of Washoe, ss:

Joseph Estin, of full age, being first duly sworn, deposes and says as follows:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, [fol. 53] and as to those matters he believes it to be true.

Joseph Estin.

Subscribed and sworn to before me this 16th day of April, 1945. Lloyd V. Smith, Notary Public in and for the County of Washoe, State of Nevada. My Commission Expires Sept. 19, 1948. (Seal.)

Default of the defendant for failing to appear, entered in open court, 24th day of May, A. D. 1945.

E. H. Besmer, Clerk, by A. L. Donati, Deputy Clerk.

[fol. 54] Lloyd V. Smith, Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed Apr. 17, 9:11 A. M., '45. E. H. Beemer, Clerk, by
B. Buchanan, Deputy.

Affidavit for Publication of Summons

STATE OF NEVADA,
County of Washoe, ss:

Joseph Estin, being first duly sworn, deposes and says: That affiant is the plaintiff named in the suit entitled above; that said suit has been commenced by the filing of a verified complaint and the issuance of summons thereon; that said suit is brought to obtain a decree of divorce by plaintiff from defendant, and that a good cause of action exists therefor in favor of plaintiff and against defendant, as follows:

That plaintiff is now an actual and bona fide resident and domiciled within Washoe County, Nevada, and that said plaintiff, for a period of more than six weeks, preceding [fol. 55] the filing of complaint herein, has been an actual and bona fide resident of and domiciled within the State of Nevada; that plaintiff and defendant were married to each other at Crown Point, Indiana, on July 20, 1937, and ever since have been and are now wife and husband; that although during the married life of plaintiff and defendant, plaintiff's conduct was in accordance with the marital duties, defendant and plaintiff have lived separate and apart for a period of three consecutive years, without cohabitation, all in form and manner specifically alleged in the complaint filed herein, reference to which hereby expressly is made.

That defendant is a necessary and proper party defendant in this suit; that summons cannot be served on defendant

in person within the State of Nevada; that defendant is not now in and cannot be found in the State of Nevada; and that defendant's present residence and address are:

Gertrude Knudsen Estin
353 W. 57th Street
New York, New York.

Wherefore, affiant prays for an order of Court directing that service of process be made herein on defendant by the publication of summons in some newspaper designated as most likely to give notice to defendant of the pendency of this suit, and by mailing to defendant, at said last known address, a copy of the Summons attached to a duly certified copy of the Complaint, all in manner and form required by law, and further directing that personal service of process, [fol. 56] in due form, upon defendant outside the State of Nevada, be equivalent to complete service by publication and mailing; and for all proper relief in the premises.

Joseph Estin.

Subscribed and sworn to before me this 17th day of April, 1945. Lloyd W. Smith, Notary Public, Washoe County, Nevada. (Seal.)

Lloyd V. Smith, Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed Apr. 17, 9:11 A. M., '45. E. H. Beemer, Clerk, by
B. Buchanan, Deputy.

Order for Publication of Summons

Upon reading the affidavit of plaintiff, duly filed herein, it appears to the satisfaction of the Court, and the Court finds, that defendant herein resides outside of the State of

[fol. 57] Nevada, that defendant cannot be found within the State of Nevada, and that summons herein cannot be served upon defendant in person within the State of Nevada; and it appearing from said affidavit and from the verified complaint filed herein, and the Court here finds, that a cause of action exists in favor of plaintiff and against defendant, that defendant is a necessary and proper party herein, and that the residence and address of defendant are

Gertrude Knudsen Estin
353 West 57th Street
New York, New York

and it further appearing that the Reno Evening Gazette is a newspaper published in the City of Reno, Washoe County, State of Nevada, and is the newspaper most likely to give notice to defendant of the pendency of the suit;

Now, therefore, it is hereby ordered that summons in this suit be served on defendant herein, by publication thereof in the above named newspaper; and that said publication be made for a period of four weeks and at least once a week during said time;

It is further ordered and directed, that a copy of the summons and a certified copy of the complaint be deposited forthwith in the United States Post Office at Reno, Nevada, enclosed in an envelope upon which the postage is fully prepaid, addressed to defendant, at

Gertrude Knudsen Estin
353 W. 57th Street
New York, New York.

[fol. 58] It is further ordered that due service of a copy of the summons and a certified copy of the complaint on defendant in person outside the State of Nevada shall be equivalent to complete service by publication and deposit in the United States Post Office, and that such process may be served upon defendant as prescribed by statute.

Done in open Court, April 17", 1945.

Edgar Eather, District Judge, Presiding.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF WASHOE

No. 89547

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Dept. No. 1. Filed May 24, 10:36 AM., '45. E. H. Beemer,
Clerk. By V. Whitehead, Deputy.

Summons

The State of Nevada Sends Greetings to the Said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this Summons if served in said [fol. 59] county, or within twenty days if served out of said county but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above-entitled action. This action is brought to recover a judgment, against you, granting to Plaintiff a decree of divorce, forever dissolving the bonds of matrimony now existing between you and plaintiff on the ground of three years continual separation, without cohabitation, as will more fully appear from the verified complaint on file herein.

Dated this 17th day of April, A. D. 1945.

E. H. Beemer, Clerk of the Second Judicial District
Court of the State of Nevada, in and for Washoe
County. By B. Buchanan, Deputy. (Seal.)

Lloyd V. Smith, Reno, Nevada, Attorney for Plaintiff.

[fol. 60]

Affidavit of Service

STATE OF NEW YORK,

County of New York, ss:

Jacques J. Benjamin being first duly sworn, deposes and says: That he is and was on the day when he served the annexed summons, a citizen of the United States, over the age of twenty-one years, and not a party to the above

entitled action; that he received the annexed summons in said action on the 20- day of April, 1945 and personally served the same upon Gertrude Knudsen Estin the above-named defendant on the 20- day of April 1945, by delivering to Gertrude Knudsen Estin the said defendant personally in New York City, County of New York, State of New York, a copy of the annexed summons attached to a duly certified copy of the complaint in the above-entitled action.

Jacques J. Benjamin.

Subscribed and sworn to before me this 20th day of April, 1945. Robert J. Goldstein, Notary Public in and for the County of New York, State of New York. My Commission expires March 30, 1946. (Seal.)

Robert J. Goldstein, Notary Public. New York Co. Clk's No.—. New York County Register's No. 199G6. Certificate filed Westchester County. Commission expires March 30, 1946.

[fol. 61] No. 89547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed May 24, 2:22 PM., '45. E. H. Beemer, Clerk. By M. Dowd, Deputy.

Findings of Fact and Conclusions of Law

This case came on regularly for trial upon this 24th day of May, 1945, before the undersigned Judge of said Court, sitting without a jury. Plaintiff was present in person and by his attorney, Lloyd V. Smith, Esq. Defendant was not present, although Defendant had been personally served with summons on the 20th day of April, 1945, and thereupon the default of the Defendant was noted and entered at length in the Minutes.

Certain evidence was adduced by the Plaintiff, and the Plaintiff was sworn and examined in his own behalf, whereupon the Plaintiff rested, and there being nothing offered on the part of the Defendant, the case was thereafter submitted to the Court for its decision.

The Court then and there being fully advised in the premises and having considered and understood the law and [fol. 62] the evidence, rendered its decision in favor of the Plaintiff and against the Defendant and ordered that Findings of Fact, Conclusions of Law and Decree be drawn in accordance therewith.

Now, therefore, in accordance with the foregoing decision the Court makes its Findings of Fact from the evidence as follows:

Findings of Fact

The Court finds as a matter of fact:

I

That plaintiff is now, and ever since the 30th day of January, 1944, has been an actual, bona fide resident of the State of Nevada and that for more than six weeks immediately preceding the commencement of this action Plaintiff has been actually physically and corporeally present in said State and during all of said time has had his actual residence and home in said State, and took up his residence and home with an intention to remain permanently, which intention continued during all of said time and still continues and Plaintiff still resides in said State aforesaid; and that said Plaintiff is now domiciled in the State of Nevada with an intention to make his permanent home in said State for an indefinite period of time.

II

That Plaintiff and Defendant were married in the City of [fol. 63] Crown Point, Indiana, on the twentieth day of July, 1937, and ever since said date have been, and now are, husband and wife.

III

That there are no children the issue of said marriage.

IV

That there is no community property belonging to the Plaintiff and the Defendant in the State of Nevada, or elsewhere.

The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the Defendant herein and against Plaintiff herein, awarding to the Defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That Plaintiff herein has at all times since the entry of the decree complied with the terms thereof. That said New York Supreme Court Judgment is not *res judicata* of the matters alleged in Plaintiff's complaint.

V

That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the Plaintiff and Defendant have lived separate and apart without cohabitation.

[fol. 64]

Conclusions of Law

From the foregoing facts the Court draws the following Conclusions of Law:

I

That the Plaintiff is now and since the 30th day of January, 1914, has been an actual bona fide resident of the State of Nevada.

II

That Plaintiff is entitled to the Judgment and Decree of this Court for an absolute divorce from Defendant on the ground that the parties have lived separate and apart for a period of more than three consecutive years, without cohabitation.

Let judgment be entered accordingly.

Done in open Court this 24th day of May, 1945.

Wm. McKnight, District Judge.

[fol. 65]

No. 89547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed May 24, 2:23 PM, '45. E. H. Beemer, Clerk. By
M. Dowd, Deputy.

Decree

This case came on regularly for trial before the undersigned Judge of said Court, sitting without a jury, Plaintiff appearing in person and by his attorney, Lloyd V. Smith, Esq., and the defendant not appearing, although Defendant had been personally served with summons on the 20th day of April, 1946, and thereupon the default of the Defendant was noted and entered at length in the Minutes, and such proceedings were regularly had herein that on this, the 24th day of May, 1945, the Court rendered its decision in favor of the Plaintiff and against the Defendant, made and entered herein its certain Findings of Fact and Conclusions of Law and ordered that Judgment be entered accordingly.

Now, therefore, in consideration of the premises and in [fol. 66] conformity with said Decision, Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows:

That the Plaintiff is a bona fide resident of the County of Washoe, State of Nevada and has been such since the 30th day of January, 1944.

It is further ordered, adjudged and decreed that Plaintiff be, and he hereby is, granted a decree of divorce from Defendant on the ground of three years continual separation, without cohabitation, same being final and absolute in form, force and effect, the laws of the State of Nevada providing no interlocutory period or conditions or restrictions on remarriage; and that the bonds of matrimony now and heretofore existing between Plaintiff and Defendant are fully, completely and forever dissolved and that Plaintiff

and Defendant are both and each hereby restored to the status of single persons.

Done in open Court this 24th day of May, 1945.

Wm. McKnight, District Judge.

Recorded in Judgment Record Book A 69, Page 554.
E. H. Beemer, County Clerk. By A. L. Donati, Deputy Clerk.

[fol. 67]

No. 89547

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Judgment Roll

Filed May 24th, A. D. 1945. E. H. Beemer, Clerk. By
A. L. Donati, Deputy Clerk.

Lloyd V. Smith, Attorney for Plaintiff. — — —, At-
torney for Defendant.

[fol. 68]

Lloyd V. Smith
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed 1945, May-24-PM. 1:55. E. M. Beemer, Clerk. By
B. Ellsworth, Deputy.

Affidavit

STATE OF NEVADA,
County of Washoe, ss:

I, Joseph Estin, the plaintiff above named, being first duly sworn depose and say:

That I make this Affidavit in compliance with the requirements of the act of Congress entitled "Soldiers' and Sailors' Civil Relief Act of 1940."

That the above named defendant, Gertrude Knudsen Estin, is not now in, and has not within sixty days last past been discharged from military service as defined in said Act, and in support thereof affiant states the following to be the facts:

That Defendant is over the age of military service and resides at New York City, New York, and is employed by [fol. 69] Johnson & Higgins, 63 Wall Street, New York, New York, and has been so employed for the past twenty years.

Joseph Estin.

Subscribed and sworn to before me this 24th day of May, 1945. Lloyd V. Smith. (Seal.)

No. 89,547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Be It Remembered, that the above entitled action come on regularly for trial in Department No. 1 of the above entitled Court, on Thursday, the 24th day of May, A. D. 1945, at the hour of 2:05 o'clock P. M. of said day, before Hon. William McKnight, Judge of said Court, sitting without a jury. [fol. 70] Plaintiff was present in person and represented by his attorney, Lloyd V. Smith, Esq.

Defendant did not appear.

J. A. Callahan, Reporter pro tempore of said Court, was present and acted as such, and thereupon the following proceedings were had, and testimony taken, to wit:

The Court: This is case No. 89,547—Estin v. Estin.

Mr. Smith: Ready, your Honor.

The Court:

Q. Have you examined the record in this case, Miss Clerk?

Deputy Clerk Ellsworth:

A. I have, your Honor.

Q. When?

A. Before coming into Court.

Q. Has there been any answer, demurrer or other pleading filed on behalf of the defendant?

A. No appearance, your Honor.

The Court: You will therefore enter the default of the defendant for failing to demur, answer or otherwise plead to plaintiff's complaint within the time required by law.

You may proceed.

Testimony of MARGARET BRAULT, who was first duly called and sworn as to a witness on behalf of the plaintiff, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your name.

A. Margaret Brault.

[fol. 71] Q. Are you employed in Reno, Nevada?

A. Yes, sir.

Q. Where are you employed?

A. At the El Cortez Hotel in Reno, Nevada.

Q. In what capacity?

A. Clerk.

Q. Are you acquainted with Joseph Estin, the plaintiff in this action?

A. I am.

Q. When did you first meet him?

A. January 30, 1944.

Q. Under what circumstances?

A. He came to establish his permanent residence.

Q. Did he take up his permanent residence at the Hotel El Cortez?

A. Yes, on January 30, 1944.

Q. How long did he reside at the hotel continuously thereafter?

A. Until March 23, 1944.

Q. Did you have occasion to see him at the hotel later?

A. Yes, sir, from April 19, 1944.

Q. From January 30, 1944, to March 23, 1944, did you have occasion to see him in Reno, Washoe County, Nevada, each and every day?

A. Yes.

Q. And from April 19, 1944, to May 16, 1944, did you have occasion to see him in Reno, every day?

A. Yes.

Q. And he came back on November 3, 1944?

A. Yes, he came back on November 3, 1944, and remained until November 9, 1944.

Q. Did you see him each day between those dates?

A. Yes, sir, I did.

Mr. Smith: That is all.

The Court: That is all. You may be excused.

[fol. 72] Testimony of MARJORIE DUVALL, who was first duly called and sworn as a witness on behalf of the plaintiff, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your name.

A. Marjorie Duvall.

Q. Where do you live?

A. 134 East Second Street, The Wyn Hotel, in Reno, Nevada.

Q. Do you own or manage that hotel?

A. I am the owner and manager.

Q. Are you acquainted with Joseph Estin, the plaintiff in this action?

A. Yes.

Q. When did you first meet him in Reno, Nevada?

A. November 9, 1944.

Q. Under what circumstances?

A. As a guest in the hotel.

Q. Did he take accommodations at your hotel on November 9, 1944?

A. Yes.

Q. Ever since that date has he continuously had those accommodations?

A. Yes, he is still at the hotel. He has been away a few times in the last few months.

Q. Has he at all times maintained accommodations there?

A. Yes.

Q. For more than six weeks prior to April 16, 1945, did you have occasion to see him each and every day here in Reno, Nevada?

A. Yes.

Q. Since April 17, 1945, he has been away how often?

A. About three or four times at two, three or four weeks at a time.

[fol. 73] Q. You state emphatically that he has continued to keep his accommodations there at all times, even when he was away; is that correct?

A. Yes, sir.

Mr. Smith: That is all.

The Court:

Q. Was that three or four weeks or days ago?

A. I do not understand.

Q. I understood you to say that since April 17, 1945, he has been away for three or four weeks at a time. Do you mean three or four weeks or three or four days at a time?

A. No, the last few months he has been away two or three weeks at a time.

Q. Since April 17, 1945, how much time has he been away?

A. He has been away once, I believe.

The Court: That is all. You may be excused.

Mr. Smith: Will you go forward.

Testimony of JOSEPH ESTIN, who was first duly called and sworn as a witness on behalf of himself, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your full name.

A. Joseph Estin.

[fol. 74] Q. Are you the plaintiff in this action in which Gertrude Knudsen is the defendant?

A. I am.

Q. Where do you live?

A. I live at 134 East Second Street, The Wyn Hotel, Reno.

Q. When did you first come to the State of Nevada?

A. January 30, 1944.

Q. Did you have any intention at that time concerning a residence?

A. I was on my way to San Francisco when I passed through Reno and decided to stop off and look things over, and after staying here about a week I decided to establish a permanent residence here.

Q. Could you fix any date as to the time you actually made up your mind to make your permanent residence?

A. I would say a week or ten days after I arrived.

Q. In February, 1944, you reached the intention to make this your permanent home and residence and to remain for an indefinite period of time?

A. Yes.

Q. Since that time has there been any change in your intention?

A. None.

Q. Since February, 1944, have you had any other or different home than your home in Reno, Washoe County, Nevada?

A. I have not.

Q. Is that your present intention?

A. Yes.

Q. When you first came here, where did you go to reside?

A. I first lived at the El Cortez Hotel.

Q. What was that date?

A. February 30, 1944.

Q. How long did you remain there?

A. I stayed there until March 23, 1944.

Q. Then you went away on a business trip?

[fol. 75] A. I went on a business trip to San Francisco, California.

Q. How long were you gone?

A. For about three weeks.

Q. When did you come back?

A. Around April 19, 1944.

Q. You remained in Reno how long at that time?

A. I remained until May 16, 1944.

Q. Were you away from May 16, 1944, for a while?

A. I was away until October 15, 1944.

Q. Where did you go upon that occasion?

A. I went to Chicago and Newark, New Jersey.

Q. When did you return?

A. I returned to Nevada on October 15, 1944.

Q. Where did you go at that time?

A. I went to Las Vegas, Nevada.

Q. How long were you there?

A. I stayed there until November 2nd or 3rd, 1944.

Q. And then you came back to Reno?

A. Yes, on November 3, 1944.

Q. Where did you go to reside then?

A. To the El Cortez Hotel.

Q. How long did you remain there?

A. Until November 9, 1944.

Q. How did you happen to change your residence from there?

A. Due to wartime conditions it made it impossible for me to stay beyond six days.

Q. Then you went to the Hotel Wyn to reside?

A. Yes.

Q. And you have been staying there since?

A. Yes.

Q. For more than six weeks prior to April 17, 1945, were you here in Reno, Nevada, each and every day?

A. Yes, sir.

[fol. 76] Q. Prior to that time you had made occasional trips away?

A. Yes.

Q. While you were away, did you have your permanent residence here?

A. Yes.

Q. Are you registered to vote here in Nevada?

A. Yes.

Q. Do you have a bank account here in Nevada?

A. Yes.

Q. Do you have a bank account here in Nevada?

A. Yes.

Q. Do you have a safe deposit box here in Nevada?

A. Yes, sir.

Q. Is it still your intention to make your permanent home and residence in Nevada and remain for an indefinite period of time?

A. Yes, sir.

Q. Were you and the defendant married at Crown Point, Indiana?

A. That is right.

Q. Was that on the 20th day of July, 1937?

A. Yes.

Q. Are you still husband and wife?

A. Yes.

Q. Are there any children, the issue of the marriage?

A. None.

Q. Is there any community property belonging to you and the defendant in the State of Nevada or elsewhere?

A. None.

Q. The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance against you and in favor of the defendant; is that correct?

A. Yes, sir.

Q. That decree required you to pay \$180.00 per month for the defendant's support and maintenance?

A. Yes.

[fol. 77] Q. Have you been paying those payments?

A. Yes.

Q. And you are up to date on those payments?

A. Yes.

Q. You allege in the fifth paragraph of your complaint that for more than three consecutive years next preceding the filing of your complaint and since the 14th day of April, 1943, you and the defendant have lived separate and apart and without cohabitation. Is that true?

A. Yes.

Q. What brought about the separation?

A. Different reasons. One reason was there *were* no normal relationship between myself and my wife.

Q. She completely denied you the ordinary marital relations or any cohabitations; is that true?

A. Yes, sir.

Q. What sort of a disposition did she have?

A. Very disagreeable.

Q. Did she make a home for you?

A. No, sir.

Q. And you finally got tired of that and left; is that right?

A. Yes.

Q. Was that on April 14, 1942?

A. Yes, sir.

Q. Have you lived with or cohabited with her since that time?

A. No.

Q. Have you read all of the statements contained in your complaint for divorce?

A. Yes.

Q. Are they all true?

A. Yes.

Q. Is there any possibility of a reconciliation between you and the defendant?

A. Positively not.

[fol. 78] Mr. Smith: That is all.

The Court: That is all. You may be excused.

The Court: It is ordered, adjudged and decreed that the bonds of matrimony heretofore and now existing between the plaintiff and defendant be, and the same hereby are, dissolved, and each — said parties is restored to the status of a single person on the ground that said parties have lived separate and apart for more than three consecutive years, immediately preceding the filing of the complaint, without cohabitation.

The testimony will be transcribed and filed.

STATE OF NEVADA,
County of Washoe, ss:

I, J. A. CALLAHAN, official reporter pro tempore of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, Do Hereby Certify:

That as such reporter I was present in Department No. 1 of the above entitled court on Thursday, the 24th day of May, A. D. 1945, at the hour of 2:05 o'clock P. M. of said day, and that I then and there took verbatim shorthand notes of the testimony given and proceedings had therein and upon the trial of the case of Joseph Estin, plaintiff, vs. Gertrude Knudsen Estin, defendant.

That the foregoing transcript, consisting of pages numbered one (1) to twelve (12) inclusive, contains a full, true, and correct transcription of my said shorthand notes, so taken as aforesaid, and a full, true and correct statement of [fol. 79] the testimony given and proceedings had upon the trial of the said entitled action, to the best of my knowledge and ability.

Dated at Reno, Nevada, this 8th day of January, 1946.

J. A. Callahan.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOHN ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the originals thereof, and that I am the keeper of said originals, keeping same on file in my office as the legal custodian, and keeper of same under the laws of the State, and I further certify that the foregoing cop attached hereto are full, true and correct copies of the Judgment Roll consisting of the [fol. 80] following papers; Complaint, Affidavit for Publi-

cation of Summons Findings of Fact and Conclusions of Law and Decree together with Military Affidavit and Transcript of Testimony in Case No. 89547, and now on file and of record in my office.

I do further certify that the same have not been altered, amended or set aside, but are still full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 10th day of January, A. D. 1945.

E. H. Beemer, County Clerk.

Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing and attestation, ex-officio, Clerk of said Court.

That said signature is his genuine hand-writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is due form of law.

[fol. 81] Witness my hand this 10th day of January, A. D. 1946.

Wm. McKnight, One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

STATE OF NEVADA,

County of Washoe, ss:

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 10th day of January, A. D. 1946.

E. H. Beemer, County Clerk and ex-Officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

[fol. 82] EXHIBIT 1A, READ IN OPPOSITION TO PLAINTIFF'S MOTION .

E. H. Beemer, County Clerk, Washoe County Court House,
Reno, Nevada

I, E. H. Beemer, County Clerk and ex-officio registrar of voters, do hereby certify that Joseph Estin is an active, registered voter of Washoe County, State of Nevada.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of Washoe County this 7th day of January, 1946.

E. H. Beemer, County Clerk, by L. S. Wheeler, Deputy. (Seal.)

EXHIBIT 2, READ IN OPPOSITION TO PLAINTIFF'S MOTION

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1944

or fiscal year beginning 1/1, 1944, and ending 1/1, 1945
Form 1040 1944
Treasury Department
Internal Revenue Service

[fol. 83] Employees—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than \$5,000, consisting wholly of wages shown on withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

Copy

Name: Joseph Estin. (Please Print. If this return is for a husband and wife, use both first names).

Address: 134 East Second Street. (Please Print. Street and number or rural route). (City or town, postal zone number): Reno. (State): Nevada. Social Security No. (if any): 093-07-2744.

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your Exemptions: Name (Please print).

Your name: Joseph Estin.

[fol. 84] EXHIBIT 3, READ IN OPPOSITION TO PLAINTIFF'S MOTION

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

U. S. Individual Income Tax Return for Calendar Year 1945 or fiscal year beginning 1945 and ending 1946

1945

Form 1040

Treasury Department, Internal Revenue Service

Employees—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends and interest.

Name: Joseph Estin. (Please Print. If this return is for a husband and wife, use both first names).

Address: 134 East Second Street. (Please Print. Street and number or rural route). (City or town, postal zone number): Reno. (State): Nevada.

Occupation: —.

Social Security No.: 093-01-2744.

[fol. 85] Your Exemptions:

List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

1. Name (please print) Relationship

Your name: Joseph Estin x x x x x

Enter your total wages, bonuses, commission, and other compensation received in 1945. Before pay-roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

2. Print Employer's Name: None.


Your Income: Enter total here  None

EXHIBIT 4, READ IN OPPOSITION TO PLAINTIFF'S MOTION
Declaration of Estimated Income Tax by Individuals
(Form 1040-ES)

Your Copy of Declaration of Estimated Tax
(Form 1040-ES)

1945

Name: Joseph Estin.

Copy these figures on the Declaration which you will file with the collector.

Keep this copy for use in making your Annual Return.

(Detach at this line.)

[fol. 86] Declaration of Estimated Tax

Name: Joseph Estin. (Please print. If this declaration is for a husband and wife, use both first names).

Social Security No., if any: 093-07-2744.

Address: 134 East 2nd Street. (Please print) (Street and number or rural route).

(City or town, zone number): Reno. (State): Nevada.

- | | |
|--|------|
| | 1945 |
| 1. Estimated Income Tax for 1945..... | None |
| 6. Unpaid balance of Estimated Tax (item 3
less the sum of items 4 and 5) | None |
| 7. Amount paid with this declaration. (Read
carefully Instructions 3 and 4) | None |

I declare under the penalties of perjury that this declaration has been examined by me and to the best of my knowledge and belief is a true, correct, and complete declaration.

— — —, (Signature of taxpayer or agent).

Dated Mar. 14, 1945.

[fol. 87] EXHIBIT 5, READ IN OPPOSITION TO PLAINTIFF'S
MOTION

(Poll Tax Receipt 1944)

No. 5250

County of Washoe, Nevada

1944

Nov. 8, 1944.

This Certifies, That Joseph Estin has paid Three Dollars
Poll Tax for the year 1944.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

EXHIBIT 6, READ IN OPPOSITION TO PLAINTIFF'S MOTION

(Poll Tax Receipt for 1945)

No. 1064

County of Washoe, Nevada

1945

Jan. 4, 1945.

This Certifies, That Joseph Estin has paid Three Dollars Poll Tax for the year 1945.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

[fol. 88] EXHIBIT 7, READ IN OPPOSITION TO PLAINTIFF'S MOTION

(Poll Tax Receipt for 1946)

No. 1305

County of Washoe, Nevada

1946

Jan. 9, 1946.

This Certifies, That Joseph Estin has paid Three Dollars Poll Tax for the year 1946.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

EXHIBIT 8, READ IN OPPOSITION TO PLAINTIFF'S MOTION

No. 27707

Personal Property Tax Receipt for 1945

State of Nevada, County of Washoe. Assessed to Joseph Estin. Address: Hotel Wynn. County of Reno, Total, \$399.

[fol. 89]

Number	Description	Valuation	Tax
3375	Chry 41 Sedan	1200	47.88
Total		1200	47.88
1-4-1945			

Received of as above forty-seven & 88/100 Dollars, being the amount of State and County Taxes (both general and special) on the above-described property for the year ending December 31, 1945.

Frank Campbell, County Assessor. J. C., Deputy.

Delle B. Boyd, County Auditor.

EXHIBIT 9, READ IN OPPOSITION TO PLAINTIFF'S MOTION

No. 23407

Personal Property Tax Receipt for 1946

State of Nevada, County of Washoe. Assessed to Joseph Estin. Address: Hotel Wynn. County of Reno, Total \$424.
[fol. 90]

Number	Description	Valuation	Tax
1479	41 Chrysler Sed.	730	30.95
Total		730	30.95
1-9-1946			

Received of above thirty & 95/100 Dollars, being the amount of State and County Taxes (both general and special) on the above-described property for the year ending December 31, 1946.

Frank Campbell, County Assessor. J. C., Deputy.

Delle B. Boyd, County Auditor.

EXHIBIT 10, READ IN OPPOSITION TO PLAINTIFF'S MOTION

Office of County Assessor
 Washoe County, Nevada
 Motor Vehicle Department
 Frank Campbell, Assessor

Reno, Nevada, January 9, 1946.

TO WHOM IT MAY CONCERN:

This is to advise that Mr. Joseph Estin, of the Hotel Wynn, 134 East 2nd Street, Reno, Nevada, registered a [fol. 91] 1941 Chrysler 4 Door Sedan in 1944, receiving license #10-595, and paid a poll tax of \$3.00, receipt number 5250.

On January 4, 1945, he renewed his license, receiving license No. 3375, on said automobile, paying

License fee	\$ 5.00
Personal Property Tax	47.88
Poll Tax—Receipt No. 1064	3.00

Total	\$55.88
-------	---------

On January 9, 1946 he again renewed his license on said car, receiving license number 1479, paying

License fee	\$ 5.00
Personal Property Tax	30.95
Poll Tax—Receipt No. 1305	3.00

Total	\$38.95
-------	---------

Yours very truly, Frank Campbell.

FC:W.

Frank Campbell first being sworn, deposes and says that the above statement is true and correct to the best of his knowledge and belief.

Frank Campbell.

Subscribed and sworn to this 19th day of March, 1946. E. H. Beemer, County Clerk. (Seal.)

[fol. 92] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

REPLY AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO APRIL 12,
1946, READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:
City of New York,

Gertrude Estin, being duly sworn, deposes and says that she is the plaintiff herein, that she, by her attorney Roy Guthman, Esq., on February 20th, 1946, obtained an Order to Show Cause of the above entitled Court requiring her husband, the above named defendant, to show cause why an order should not be made directing the entry of judgment for the amount of \$1,620.00 arrears in the payment of sums of money, with interest, required to be paid by the defendant under the judgment of this Court in this action which is a separation action entered on October 13th, 1943, for the support and maintenance of the plaintiff, deponent; that the said judgment has not been modified or changed since its entry and is still in full force and effect as this deponent is informed and advised.

Deponent further says that some of the statements of fact contained in the affidavit of Joseph Estin, the defendant, verified March 19, 1946, and filed in opposition to the Order to Show Cause herein, are fal-acious and she further [fol. 93] deposes to establish the correct state of facts for the consideration of the Court.

In the concluding paragraphs on page #4 of the said affidavit of the defendant Joseph Estin reference is made to the stipulation agreement, dated March 16, 1943, which is Exhibit B attached to the moving papers herein and the original of which is among the filed papers herein attached to the Referee's Findings, which will be before the Court in its consideration of this motion; in the last paragraphs on page 4 of the defendant's said affidavit he states "Subsequently to the signing of this stipulation (Exhibit B) an action for separation was commenced by the plaintiff against me, and upon my default therein the matter was submitted by the Court to an Official Referee to hear and determine and to make findings of fact and conclusions of Law, which was done." The first line of the above quota-

tion is false and the defendant made it knowing that it is false and made it to mislead the Court.

This action was started by the personal service of the summons and complaint on the 5th day of February, 1943, as appears by the Original Summons and Complaint and affidavit of service which are among the filed papers before the Court. Defendant must have made such false statement knowingly, deliberately and with intention to mislead because in the second paragraph of said stipulation (Exhibit B), which the defendant must have had before him when he made his said affidavit of March 19th, 1946, it is stated, [fol. 94] "Whereas, the summons and complaint herein etc. were heretofore served upon the defendant on the 5th day of February, 1943." This flagrant false statement of the defendant Joseph Estin, under oath impeaches the veracity of the other statements in his said affidavit. When a witness is shown to have sworn falsely to a material statement in testifying in an action no faith or credit should be given to any of his testimony. Deponent further says that she is informed and verily believes that the above statement in analogous words is very frequently given to juries in charges by Courts in summing up.

Defendant made said statement to lead the Court to believe that the separation between plaintiff and defendant which lead up to this above entitled action occurred by mutual consent and agreement which culminated in the stipulation of March 16th, 1943, and that this above entitled action is a part of an amicable agreement and settlement.

The plaintiff commenced this action by reason of the abandonment of her and her home by her husband Joseph Estin, the defendant, and his cruel and inhuman treatment of her, because he openly kept company continually and entertained a neighbor woman, Hilma Fredzel Wood and committed adultery with her, all of which appears by the complaint filed herein and by the affidavit of the deponent verified February 1, 1943 and filed herein in connection with the motion for a temporary alimony and counsel fees, to which complaint and affidavit the deponent refers and makes a part hereof as if herein re-written.

[fol. 95] After said summons and complaint had been served on the defendant Joseph Estin, he became very much excited and distraught and declared that he would do everything possible to protect Hilma, as he called her, meaning Hilma Fredzell Wood, named in the complaint, from pub-

licity. It was then February 9th, 1943 that the defendant's attorney of record, Mitchell Salem Fisher, Esq., filed his notice of appearance herein but did not file an answer and at once commenced negotiations with the plaintiff's attorney which lead up to the agreement and stipulation of March 16th, 1943, and six weeks after the commencement of the action, for the consideration that at the hearing before the Official Referee no evidence of the defendant's adultery would be introduced.

The defendant's attorney of record, Mitchell Salem Fisher, Esq., wrote the contract stipulation (Exhibit B). To be sure the plaintiff's attorney took part in the negotiations which resulted in the drawing of the stipulation but the defendant's attorney drew it up and had it written in his office. Therefore the stipulation should be most strongly construed against the defendant.

The plaintiff was loath to sign the stipulation and she was finally persuaded that the agreement was drawn to protect her so that she finally did sign, and within three months after she signed and the contract, stipulation (Exhibit B) was executed the defendant and his attorney have done and said everything they could to make its provision [fol. 96] worthless and of no effect. The defendant's attorney, Mitchell Salem Fisher, not only drew and filed his Notice of Appearance herein on February 9th, 1943, and negotiated and drew the contract (Exhibit B) but he personally attended and was present at the hearing before the Official Referee although he did not take any part in said hearing. Could it be that he was present to make certain that he and his client received their consideration for the contract (Exhibit B), what the defendant considered the most important item, that his paramour, Hilma Fredzell Wood be protected from publicity?

Nothing was said at the hearing, no testimony was put in about the acts of adultery of the defendant.

As before stated the defendant received his consideration for the contract by the forbearance of the plaintiff's attorney from introducing testimony as to the defendant's acts of adultery or keeping company with Hilma Fredzell Wood; further in the 9th and last paragraphs of the stipulation (Exhibit B) it recites, "Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under any such decree, if entered it becomes necessary for the plaintiff to obtain the services of any process or paper

or notice of any kind upon the defendant, the defendant hereby appoints his attorney, Mitchell Salem Fisher, Esq., 30 Pine Street, New York City, as his agent and attorney in fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot, with [fol. 97] reasonable diligence, be found within the City of New York." This paragraph is part and parcel of the contract, the only paragraph which is of any value or consideration for the plaintiff. It constitutes a power of attorney irrevocable because based on a valuable consideration and therefrom coupled with an interest. Mr. Fisher signed and executed the contract as well as did the defendant Joseph Estin.

The defendant in his affidavit tries to make much of the fact that the referee in his findings and the Justice of the Court in his decree did not incorporate any of the provisions of the stipulation other than the provision for \$500.00 attorney's fees and \$180.00 per month for the maintenance and support of the plaintiff. He refers, of course, to the fact that there is left out of the findings and the decree any injunction or stay against the defendant going out of the State to obtain a divorce.

That provision the fifth paragraph of the stipulation (Exhibit B) is to the effect that the decree shall, subject to the approval of the Court, contain a provision "that the defendant be restrained and enjoined from leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff etc." Putting this clause into the stipulation by the defendant's attorney was a stroke of Machiavellian diplomacy. He knew, if he knows any law at all, that such agreement could not be given effect, as indeed it was not, because of the well established law followed by New York Courts that a person will not be enjoined from proceeding to obtain a divorce, until and unless among [fol. 98] other things he or she has done or is doing some overt act toward getting a divorce. Nothing like that was shown in this case in 1943 so the referee and the Justice declined to incorporate the provision. As deponent has stated she was loath to sign the stipulation and much was made of the aforesaid fifth paragraph to convince her that it was for her protection and advantage in finally persuading her to sign and execute the stipulation.

As to counsel fees asked for in addition to the counsel fees heretofore awarded and paid, deponent says they are asked

for the preparation and argument of the Order to Show Cause, for the preparation and argument of the opposition to defendant's cross motion to amend the judgment of this Court dated October 13th, 1943, by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance and for the enforcement of the judgment of the court and the collection of the amount of the judgment when and if rendered. The Court will undoubtedly take judicial notice of the contingent fee fixed by usage of lawyers and bar association rules for making collections either by settlement or legal process, to wit, 25% of the amount of money collected. If there is no judgment of course there will be no fee allowed for its collection. The Court, only, knows whether or not there will be a judgment, and it is not at all speculative.

The statement in the affidavit of George S. Wing, defendant's present counsel opposing this Order to Show Cause, [fol. 99] verified March 9th, 1946, in the last paragraph of which he deposes, "Furthermore the payment of any counsel fees, it is submitted, is excluded from consideration by the terms of the stipulation which the plaintiff makes a part of her moving papers upon this motion.

The only place in said stipulation (Exhibit B) in which reference is made to additional Counsel Fees in paragraph 4 of the stipulation in which it provides that in the event that the plaintiff at any time hereafter shall institute an action for divorce the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action."

The plaintiff has not and is not instituting an action for divorce against the defendant and the above paragraph does not apply to the demand for additional counsel fees to pay counsel to conduct these proceedings made necessary by the acts of the defendant seeking to break his said contract and to evade and avoid his obligations under the judgment and decree of this Court. The Order to Show Cause in the second paragraph thereof directs the defendant to show cause why the plaintiff should not have such other and further relief as to the Court may seem just and proper. [fol. 100] Deponent further says that the amount of

\$1,620.00 arrears in the payment of the sums of money required to be paid by the defendant has been increased by arrears for two more months, to wit, March and April, 1946, which the defendant has not paid. The order to Show Cause was returnable on March 15th, 1946, and because of the time required to procure affidavits and information from Nevada, has been adjourned from time to time by the stipulations of the attorneys to April 17th, 1946.

Wherefore, the plaintiff prays that an order be made herein directing the entry of a money judgment of \$1,980.00 arrears in the payment of the sums of money, with interest, required to be paid by the defendant under the judgment of this court made and entered on the 11th day of October, 1943, together with costs.

(Sworn to by Gertrude Estin, April 12, 1946.)

[fol. 101] IN SUPREME COURT OF NEW YORK, QUEENS
COUNTY

[Same Title]

REPLY AFFIDAVIT OF ROY GUTHMAN, SWORN TO APRIL 12,
1946, READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:
City of New York,

ROY GUTHMAN, being duly sworn, says that he is an attorney-at-law and is the attorney for the above named plaintiff, that he has read the affidavits of the plaintiff, Gertrude Estin, verified April, 1946, and filed herein in connection with the motions for a money judgment and to modify or vacate the judgment of this Court in the above entitled action, and known the contents thereof; that in February and March, 1944, when he and the plaintiff went to the office of defendant's attorney, Mitchell Salem Fisher, Esq., at the latter's request to discuss a settlement of this case and judgment, the said attorney stated that the defendant Joseph Estin had gone to Reno, Nevada to secure a divorce and had the further conversation about the divorce as stated in Mrs. Estin's affidavit; that about two weeks later also in Mr. Fisher's office, the latter said that upon advice of

counsel, Mr. Estin would not sue for divorce in 1944 but would retain his domicile in Reno and return there in 1945, when he would have been separated from Mrs. Estin for [fol. 102] three years, and then start his action for divorce when the plea in bar of judgment of the Supreme Court of the State of New York, Queens County, entered on October 13th, 1943, would no longer be a good and valid defense under the Nevada Statute. Deponent has in his possession letters dated in April and May, 1944, from the law firm of Hawkins, Rhodes & Hawkins, a very reputable law firm of Reno, Nevada, in which the writer, Robert Z. Hawkins, Esq., states that Joseph Estin was in Reno and in consultation with his attorney, Lloyd V. Smith, about starting a divorce action against his wife, that Estin left Nevada in May, 1944, for parts unknown and without having commenced any divorce action.

Deponent further says that the one and only issue in this proceeding is one of law and not of fact, to wit, the effect of the Nevada divorce, the plaintiff says that she did not receive a copy of the decree of divorce said to have been granted by the Nevada Court on May 24th, 1945, and deponent believes that to be the fact. The defendant and his attorneys do not state that the time the decree was entered in Reno he, they or either of them sent the plaintiff a copy of the decree or any word about it. The copy attached to the defendant's motion papers herein is the first and only time plaintiff or deponent have seen the decree or have any knowledge of its contents and can therefore only technically deny it for the purpose of requiring its proof. The deponent states that in June 1945 he was informed by a letter from the above mentioned firm of lawyers in Reno, Hawkins, Rhodes & Hawkins, that in May 1945 a decree of divorce had [fol. 103] been entered in Reno, Nevada, in favor of Joseph Estin against Gertrude Estin, but did not receive any information of the contents of the decree or grounds for the divorce.

Deponent further says that in the third paragraph of the affidavit of George S. Wing one of defendant's counsel in making the motion to modify or vacate the judgment herein, verified March 25th, 1946, and attached to said motion papers, the affiant, George S. Wing states that the defendant (Joseph Estin) appears voluntarily in opposition to the motion for a money judgment and does not recognize the

Elity of the service upon the said attorney Mitchell Salem
ther, Esq. Deponent says that this present motion by
dplaintiff for a money judgment for the arrears of money
s her from the defendant for her support is the third
ah motion made by the plaintiff within the past two years
sl four months. In each of the two prior proceedings
tvice on the defendant was made, as directed by the Jus-
o of this Court in the Order to Show Cause, by service
h Mitchell Salem Fisher, Esq., his attorney of record
iein, as well as his attorney in fact. Each time such serv-
a was sufficient to bring the defendant into court by his
orney appearing for him. On the two former occasions
b defendant by his attorney paid the amount of arrears
sore the Order to Show Cause was argued, and on the
pond occasion, in April 1945 paid in addition \$100.00
tintiff's counsel fees and so recognized the justice of plain-
[s claim for additional counsel fees in these proceedings.
ol. 104] The defendant has not voluntarily appeared in
art at any time.

Service on the defendant herein by service on Mitchell
lem Fisher, Esq., is good and sufficient service in these
ceedings because of the well-established rule of Equity
at when a Court of Equity acquires jurisdiction of a de-
adant by the personal service of a summons and com-
aint upon him followed by his appearance in Court by an
torney of record and thereupon a judgment or decree of
fe Court is rendered, requiring the defendant to do or re-
tain from a certain act or acts in the future, and when after
te judgment has been rendered, the defendant disobeys
ce decree of the Court and fails to do the act or continues
r resumes doing the forbidden act or acts, the Court of
quity retains its jurisdiction of the person of the defendant
i that it may enforce its decree and service of the papers
the proceedings to enforce the decree on the defendant's
s attorney of record in the case is deemed sufficient service.
itt vs. Davison, 37 N. Y. 235, and Thayer vs. Thayer, 149
D. 268, and other cases cited in the brief of plaintiff's
torney, the deponent, in support of this motion for a money
dgment.

Wherefore the deponent respectfully asks for the plaintiff,
his client, that the motion for a money judgment for
\$1,980.00 be granted and that the defendant's motion to mod-
fy or vacate the Judgment of Separation herein be denied

with motion costs for each motion and for such other and further relief as to the Court may seem just and proper.

(Sworn to by Roy Guthman April 12, 1946.)

[fol. 105] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

NOTICE OF MOTION BY DEFENDANT TO MODIFY JUDGMENT

Please take notice that upon the annexed affidavit of Joseph Estin, sworn to the 19th day of March, 1946, and the exhibits thereto attached, the affidavit of Lloyd V. Smith, sworn to the 19th day of March, 1946, the affidavit of Marjorie DeVaul, sworn to the 1st day of March, 1946, and the affidavit of George S. Wing, sworn to the 25th day of March, 1946, the Order of this Court made the 11th day of October, 1943, referring this matter to the Official Referee, the Findings of Fact and Conclusions of Law made the 29th day of September, 1943, and the Judgment herein entered the 14th day of October, 1943, and upon the proceedings had herein, the defendant will move this Court at a Special Term, Part I thereof, to be held at the Queens County Court Building, Sutphin Boulevard, Jamaica, New York, on the 3rd day of April, 1946, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order amending the Judgment herein by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance, and for such other and further relief as may be just and proper.

These motion papers being served eight (8) days before [fol. 106] the return day, copies of answering affidavits are required to be served two (2) days before the return day of the motion.

Yours, etc., Wing & Wing, Attorneys for the Defendant,
225 Broadway, New York 7, N. Y.

Dated: March 25, 1946.

To: Gertrude Knudsen Estin, Plaintiff.

To: Roy Guthman, Esq., Attorney for the Plaintiff, 11 West 42nd Street, Borough of Manhattan, City of New York.

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JOSEPH ESTIN, SWORN TO MARCH 19, 1946, READ
IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

STATE OF NEVADA,
County of Washoe, ss:

Joseph Estin, being duly sworn, deposes and says:

I reside at Wyn Hotel, 134 East Second Street, Reno, Nevada, and am the defendant in the above entitled action, [fol. 107] which said action was brought by the plaintiff, my then wife, against me for separation upon the alleged ground of willful abandonment and for maintenance and support.

The plaintiff and myself were married on July 20, 1937, in the State of Indiana, and thereafter resided together as man and wife in Queens County until April 14, 1942. That since said time we have not cohabited and have lived apart.

This action was commenced by the service of a summons and complaint on the 5th day of February, 1943, and I appeared in the action by my attorney, Mitchell Salem Fisher, Esq., but no answer to the complaint was served by me and upon my default the matter was referred by the Court to Hon. James C. Van Sieten, Official Referee, to hear and determine and to make and submit to the Court findings of fact and conclusions of law. A hearing before the Official Referee was held on May 14, 1943, at which time testimony was offered by the plaintiff and a stipulation, which had been entered into between the plaintiff and myself on March 16, 1943, together with two other stipulations, dated respectively April 1, 1943, and April 12, 1943, modifying or supplementing the first stipulation were offered and received in evidence.

Thereafter proposed Findings of Fact and Conclusions of Law were submitted to the Official Referee, which proposed Findings of Fact and Conclusions of Law included all or many of the provisions contained in the aforesaid stipulations. The Referee struck out and declined to include in the Findings of Fact and Conclusions of Law made by him any of the provisions of the said stipulations, except that pertaining to the amount of the monthly payments for support and maintenance of the plaintiff.

On the 11th day of October, 1943, the Court by its Judgment confirmed, ratified and approved the report of the Official Referee and adjudged that the plaintiff, Gertrude Estin, be separated from the bed and board of the defendant, Joseph Estin, and that I pay to the plaintiff for her support and maintenance the sum of \$180.00 per month.

That in the month of January, 1944, having disposed of my interest in a business with which I was connected and in order to get away from the scene of my most unpleasant matrimonial experience and the annoyance of being followed and spied upon by private detectives and others at the instance of my wife, I decided to go to San Francisco, California, to live.

On my way to California, I stopped at Reno, Nevada, among other places, and being pleased with living conditions and believing that this would make a pleasant and satisfactory place in which to live, I decided to remain here and took up my residence at the Hotel El Cartez, where I continued to reside until November 9th, 1944. While residing at the Hotel El Cartez, I made a number of trips of relatively short duration, not exceeding two or three weeks, with the exception of a trip during the summer of 1944, when I went as far as Chicago and to Newark, New Jersey, for business reasons. On November 9th, 1944, I [fol. 109] moved from the Hotel El Cartez to the Wyn Hotel, 134 East Second Street, Reno, Nevada, where I have ever since continued to reside and am residing at the present time. I have maintained no other place of residence than the aforesaid since leaving New York in January, 1944.

I became a registered voter in Washoe County on March 28th, 1945, and have since said time voted in that county.

My United States Individual Income Tax Return, which was prepared and filed for the year 1944, gives as my address No. 134 East Second Street, Reno, Nevada, and such return prepared and filed for the year 1945, likewise gives the same address. On March 14, 1945, I prepared and filed a declaration of estimated income, therein stating my address to be No. 134 East Second Street, Reno, Nevada. True and correct photostatic copies of the headings of the aforementioned tax returns and of the declaration of estimated income are attached hereto, made a part hereof, and marked Exhibits 2, 3 and 4.

On the 8th day of November, 1944, I paid my poll tax for said year, and on January 4, 1945, I paid my poll tax then

due and again on January 9, 1946. Receipts for said poll taxes so paid by me are hereto attached and made a part hereof and marked Exhibits 5, 6 and 7.

On January 4, 1945, I paid my personal property tax based on the ownership of my automobile and again on January 9, 1946, I paid said tax, in each instance receiving receipts therefor, photostatic copies of which are hereto [fol. 110] attached and made a part hereof and marked Exhibits 8 and 9 respectively.

In the year 1944, as a resident of the State of Nevada, I was issued automobile owner's license No. 10595, and on January 4, 1945, I was issued automobile license No. 3375 for the year 1945 and again on January 9, 1946, I was issued automobile license No. 1479 for the year 1946. Attached hereto is a statement from the County Assessor of Washoe County, Motor Vehicle Department, certifying to the aforesaid information respecting the issuance of the aforementioned automobile owner's licenses, and marked Exhibit 10.

After having taken up my residence in Reno, Nevada, through my attorney, Mitchell Salem Fisher, in New York, I endeavored to consummate a settlement with my then wife in the hope and belief that she might take steps to obtain a divorce. These efforts proved futile, due largely, as I believe, to the erroneous ideas of my then wife and her attorney as to my material worth.

In April 1945, after having resided in Reno, State of Nevada, for approximately 15 months, I commenced an action against my then wife, causing service of process to be made upon her by publication and in pursuance to the provisions of the laws of the State of Nevada. There being no appearance in said action by my then wife and upon her default, the case came on for hearing and after such hearing a judgment of absolute divorce was granted in my favor and against my then wife, the plaintiff herein, as of May 24th, 1945. An exemplified copy of the complete proceedings in the Nevada Court is hereto attached and marked "Exhibit 1."

I did not leave the State of New York with the intent or for the purpose of commencing an action for divorce against my then wife, nor did I take up my residence in the State of Nevada for that purpose. When I first established my residence in the State of Nevada, it was my intention to make same my permanent place of residence. I have

been a continuous resident of the State of Nevada, enjoying the privileges of a citizen of that state, for approximately 27 months. The fact that I have resided at hotels during this period has been from necessity, owing to the housing shortage, rather than from choice. It has been and is my intention to acquire and maintain a private place of residence as soon as the housing emergency and the dearth of living quarters make this possible.

As of May 24th, 1945, under the judgment of a court of competent jurisdiction of the State of Nevada, where such judgment was obtained in full compliance with the laws of that state in an action brought by me as a resident of that state in good faith and without subterfuge, the relationship of husband and wife as between the plaintiff herein and myself was legally terminated.

Under the established rule that full faith and credit shall be given by one state to the laws and decisions of another state, the judgment of the State of Nevada terminating the relationship of husband and wife supersedes the judgment for separation in the above entitled action.

[fol. 112] Wherefore, it is respectfully asked that an order be made vacating and setting aside the judgment in the above entitled action as of the 24th day of May, 1945, the date upon which the judgment of divorce was granted by the Nevada Court, and for such other and further relief as to the Court may seem just and proper.

Joseph Estin.

Sworn to before me this 19th day of March, 1946.

Lloyd V. Smith. (Seal.)

(Notarial Certificate of the Clerk of Washoe Co., Nevada.)

AFFIDAVIT OF LLOYD V. SMITH, READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

(Printed in full herein at pages 46 to 48.)

AFFIDAVIT OF MARJORIE DeVaul, READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

(Printed in full herein at page 49.)

[fol. 113] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GEORGE S. WING, SWORN TO MARCH 25, 1946,
READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY
JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

GEORGE S. WING, being duly sworn, deposes and says that I am an Attorney at Law, and one of the attorneys for the defendant herein.

The defendant herein, simultaneously with the return of an Order to Show Cause made by the plaintiff seeking a judgment for alimony, makes this Motion to modify the Judgment of Separation by striking therefrom all provision for the payment of alimony as and after May 24th, 1945, the date upon which the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, granted to the defendant a Decree of Divorce.

I have read the affidavit of Gertrude Estin and the Stipulations and Judgment of Separation submitted in support of the aforesaid motion for unpaid alimony. Said motion is brought by the service of the Order to Show Cause and Affidavits upon Mitchell Salem Fisher, Esq., as the alleged agent or attorney-in-fact of the defendant. The defendant appears voluntarily in opposition to that motion and does not recognize the legality of the service upon the alleged agent or attorney-in-fact, inasmuch as the designation of the said agent or attorney-in-fact, under the stipulation [fol. 114] respecting the same, was terminated by the refusal of the Court to incorporate provision therefor in the Decree of Separation, and any designation of such agent or attorney-in-fact thereupon became null and void.

All amounts of alimony accruing under the said Judgment of Separation prior to the date of the Nevada divorce, to wit, May 24th, 1945, have been paid, as appears from the affidavit of Gertrude Estin.

This Notice of Motion and attached affidavits are served eight (8) days before the return day of the motion to be made thereon, and Answering Affidavits intended for use in opposition to this motion must be served upon the attor-

neys for the defendant not less than two (2) days before the motion is returnable.

Wherefore, the defendant respectfully asks that the Judgment of Separation herein be set aside or modified by striking therefrom all provision made therein for the payment of alimony to the plaintiff by the defendant, and for such other and further relief as to the Court may seem just and proper.

(Sworn to by George S. Wing, March 25, 1946.)

[fol. 115] EXHIBIT 1, READ IN SUPPORT OF DEFENDANT'S
MOTION TO MODIFY JUDGMENT

(Printed herein at pages 50 to 81.)

EXHIBIT 1A, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 82.)

EXHIBIT 2, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 82 to 83.)

EXHIBIT 3, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 84 to 85.)

EXHIBIT 4, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 85 to 86.)

EXHIBIT 5, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 87.)

[fol. 116] EXHIBIT 6, READ IN SUPPORT OF DEFENDANT'S
MOTION TO MODIFY JUDGMENT

(Printed herein at page 87.)

EXHIBIT 7, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 88.)

EXHIBIT 8, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 88 to 89.)

EXHIBIT 9, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 89 to 90.)

EXHIBIT 10, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 90 to 91.)

[fol. 117] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO APRIL 12, 1946,
READ IN OPPOSITION TO DEFENDANT'S MOTION TO MODIFY
JUDGMENT

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Gertrude Estin, being duly sworn, deposes and says that she is the plaintiff in the above entitled action and makes this affidavit in reply to the affidavit of her husband, Joseph Estin, the above named defendant, verified March 19th, 1946, and attached to the motion papers of the defendant's motion to modify or vacate the judgment of this Court in this action entered herein on October 13th, 1943.

Deponent refers to and repeats the language of the affidavit verified by her on the — day of April, 1946, in this same action in connection with an application for a money judgment for arrears of the sums of money the defendant is ordered by the Judgment of this Court entered herein on October 13th, 1943, to pay for her maintenance and support and makes said affidavit a part of this affidavit as if here rewritten.

As is stated in the affidavit of George S. Wing, counsel to the defendant, in making this motion herein and in opposing the application of the plaintiff for a money [fol. 118] judgment, verified March 29th, 1946, and attached to the papers filed herein in opposition to the plaintiff's said application, the affidavits and exhibits attached to the papers and used in support of the defendant's motion to modify or vacate the judgment and in support of and in opposition to the plaintiff's application for a money judgment are with slight exceptions the same. The main point at issue in both motions is one of law, to wit: Does the purported decree of divorce which the defendant obtained by default in Reno, Nevada, on May 24th, 1945, supersede the judgment of the Supreme Court of the State of New York, Queens County, entered herein on October 13th, 1943, and put an end to the defendant's obligations to pay to the plaintiff the sums of money which

that judgment orders him to pay to the plaintiff for her maintenance and support.

Nevertheless because there are statements in defendant's said affidavit which attack the good character of the deponent, she makes a denial of them here and begs the indulgence of the Court to hear her.

Notwithstanding the statement in defendant's said affidavit in the second paragraph on page 5 thereof that he did not go to the State of Nevada for the purpose of getting a divorce, it is a fact and deponent solemnly states that in January, 1944, before he left New York, defendant asked her to give him a divorce. "On January 8, 1944, my husband asked me to divorce him, though he knew from the inception that I would not and he knew why. I told him I would not go to Reno, but he said, 'It could be [fol. 119] arranged.' I told him no. He then said he would fight me, and that he was leaving town. I would not agree to a divorce because of Mrs. Wood's presence in the matter."

That in February, 1944, the defendant's New York attorney, Mitchell Salem Fisher, Esq., asked that the defendant and her attorney, Roy Guthman, meet him at his then office at 30 Pine Street, Manhattan, New York City, to discuss a cash settlement and disposition of the judgment of this Court of October 13th, 1943; that the said attorney Fisher for his client, the defendant herein offered to pay to the plaintiff the lump sum of \$5,000.00 in full settlement, discharge satisfaction and release of said judgment, provided that the deponent would enter her appearance by attorney in an action for divorce which the defendant was about to commence in Reno, and would agree not to oppose or contest such action; that the defendant had gone there for the purpose of getting a divorce and had engaged Lloyd V. Smith, Esq., an attorney there, to whom the defendant had been referred by his New York attorney, the said Mitchell Salem Fisher, Esq.

The plaintiff, deponent, refused the offer because insufficient, and said that if the offer was made sufficiently large she might consider it. Plaintiff's attorney, Roy Guthman, Esq., then said to Mr. Fisher that he believed that a successful defense could be interposed in any divorce action Joseph Estin might start in Nevada that year, that the judgment of this Court in this separation action would be a prevailing plea in bar to any complaint

[fol. 120] Joseph Estin might file based on a two-year separation and cited the Nevada decision, *Vickers vs. Vickers*, 45 Nevada 274; 202 Pacific 31, decided in 1921. Mr. Fisher asked me to consider his offer, which I promised to do, and promised to see him again in about two weeks. Early in March, 1944, again at Mr. Fisher's request, in company with my said attorney, Roy Guthman, I went again to Mr. Fisher's office. He repeated his cash offer and stated that the amount he stated was not final, but that if I would indicate that I would make some kind of settlement he would try to get a better offer from his client. I stated that I would not submit myself to the jurisdiction of a Nevada Court so that Joseph Estin could get a divorce. Mr. Guthman asked Mr. Fisher's opinion of the case of *Vickers vs. Vickers*, mentioned above, as a precedent which would stop defendant's efforts to get a divorce in Nevada. Mr. Fisher stated that the defendant on advice of Nevada counsel was not going to sue for divorce that year; that he had established his domicile there by six weeks' residence, under the Nevada statute; that he would retain and maintain that domicile there and return in a year and sue for a divorce on the grounds of a three-year separation, that since the decision of the *Vickers* case in 1921, the Nevada Legislature had added a statute to the effect that where spouses have been separated for three years or more and there is no chance of a reconciliation and their living together again, the Court shall grant a divorce in spite of any pleas in bar which might be introduced.

[fol. 121] Deponent further says that Mitchell Salem Fisher, Esq., is a brilliant lawyer of excellent reputation at the New York bar and she believes him when he says that her husband went to Nevada in January, 1944, and engaged Lloyd V. Smith, Esq., on his recommendation for the purpose of getting a divorce from the deponent as soon as may be.

Deponent further says that she and the defendant resided in New York City in the State of New York for about 15 years before their marriage in 1937 and both resided in Queens County in New York State from the date of their marriage until their separation in April, 1942, and lived apart, but continuously in New York State, until a month after the judgment of separation in this case on October 13th, 1943. The plaintiff has continued to live in New

York City, State of New York, since, but the defendant left New York City and State in November or December of 1943.

Their continued residence in New York for fifteen years, together with five years' residence together as man and wife in Queens County, and the judgment of this Court in October, 1943, definitely established the marital domicile of the plaintiff and defendant in Queens County, New York State. The defendant could not carry that domicile around in his pocket and take it to Reno, Nevada, and conveniently leave it resting there in a hotel for a year while he made extended trips to San Francisco, Calif., Chicago, Ill., Newark, N. J., and other way points, as defendant recites in his affidavits. After the judgment [fol. 122] of this Court in October, 1943, the marital domicile no longer followed the person of the defendant, the husband, and remained that of the wife, the plaintiff, who has continuously remained in New York.

In November, 1943, Hilma Fredzel Wood, the woman with whom it is charged in plaintiff's complaint herein the defendant misconducted himself, went to Chicago with her sister, who was ill, and went to Chicago for an operation. Mrs. Wood and her sister stayed at the Hotel Wellington Arms in Chicago.

That the defendant, Joseph Estin, went to Chicago with or about the same time as Hilma Fredzell Wood and stayed at the same hotel, The Wellington Arms; plaintiff's attorney, Roy Guthman, Esq., has in his possession a letter from Robert Greene, the manager of the Wellington Arms Hotel, dated December 7th, 1943, in which the said manager writes that Joseph Estin "has been a guest of ours since November 10th, last"; upon information received through my attorney from Milton Solomon, Esq., of 165 Broadway, Manhattan, New York City, Mrs. Wood's attorney, Mrs. Wood left Chicago at the end of January or the first of February, 1944, and went to Reno, Nevada, to establish a domicile for the purpose of obtaining a divorce, and upon Mr. Solomon's recommendation and introduction retained Lloyd V. Smith, Esq., the same Reno attorney who represented the defendant, Joseph Estin, in suing for divorce in Reno, Nevada. Mrs. Wood did get her divorce from her husband in Reno on March 20th, 1944, and left that same [fol. 123] evening to return to New York. Mr. Joseph Estin was in Reno, Nevada, with Mrs. Wood, as deponent is

informed by a letter dated March 25th, 1944, in the possession of plaintiff's said attorney from the law firm of Hawkins, Rhodes & Hawkins of Reno, Nevada. Deponent is informed that the Robert Hawkins who signed the letter for the firm is or was a non-resident member of the Bar Association of the City of New York.

In a letter from the same law firm dated May 23rd, 1944, the writer, Robert Z. Hawkins, states that the defendant, Joseph Estin, had left Nevada and his sources of information were uncertain as to whether or not he planned to return, nor was he able to learn where the defendant went.

In a letter from the aforementioned law firm dated April 21, 1944, Mr. Robert Z. Hawkins writes, "Supplementing my letter of April 5th, I understand that Mr. Smith (meaning Lloyd V. Smith, Esq.) has been contacted by Mr. Estin and Mr. Smith may file suit for Mr. Estin in the near future." He did not start the action until a year later, probably for the reasons hereinbefore stated. There is no doubt but that Joseph Estin went to Reno, Nevada, for the purpose of suing for divorce and only stayed there continuously for the six weeks required by the Nevada Statute in 1944 and again in 1945.

Of the three years' separation mentioned in the defendant's purported divorce decree attached to his moving papers, one-half of that time, eighteen months, is the legal [fol. 124] separation decreed by the judgment of this Court in October, 1943, and did not give the Nevada Court or any other Court jurisdiction to decree a divorce because of such legal separation and so render of no effect the judgment of this New York Court.

The defendant on the 5th page of his affidavit asks that full faith and credit be given to the judgment and decree of divorce of the Nevada Court of May 24th, 1945. Like charity, full faith and credit should begin at home.

(Sworn to by Gertrude Estin, April 12, 1946.)

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JAMES G. PURDY, SWORN TO APRIL 16, 1946,
 READ IN OPPOSITION TO PLAINTIFF'S MOTION AND IN SUP-
 PORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

STATE OF NEW YORK,
 County of New York, ss:

James G. Purdy, being duly sworn, deposes and says:

I am a member of the firm of Wing & Wing, the attorneys
 for the defendant herein, and submit this affidavit in con-
 [fol. 125] nection with each of the motions herein.

I have read the replying affidavits on plaintiff's motion
 and the answering affidavits on defendant's motion, and
 hereby call the attention of the Court to the scandalous and
 impertinent matter contained in the two affidavits of the
 plaintiff, in which she charges, *without submitting any*
facts in support of those charges, that Mr. Estin com-
 mitted adultery with a neighbor, and that this was one
 of the causes of this action. Those unsupported charges
 have no relevancy to the merits of the present motions,
 are simply dirt and filth, which have no place herein. As
 such they are unworthy of any consideration, except that
 the affidavits in which they are contained should be sup-
 pressed.

Submitted herewith is a brief on which this matter is con-
 sidered in detail.

I, therefore, respectfully ask that the affidavits of Ger-
 trude Estin, each verified the 12th day of April, 1946, be
 suppressed, or in the alternative, that the scandalous and
 impertinent portions thereof be stricken therefrom, and
 that the defendant may have such other relief in the premises
 as may be just.

(Sworn to by James G. Purdy, April 16, 1946.)

[fol. 126] IN SUPREME COURT OF NEW YORK, SPECIAL TERM,
PART I

DECISION

By MR. JUSTICE HALLINAN:

Estin v. Estin—The plaintiff, in whose favor a judgment of separation was duly rendered in this court on October 11, 1943, applies, pursuant to Section 1171-b of the Civil Practice Act, for an order directing the entry of judgment for the amount of arrears, with interest, required to be paid by the defendant under the provisions of such judgment, and for a counsel fee. By a separate motion, the defendant moves, pursuant to Section 1170 of the Civil Practice, for an order to modify the aforesaid separation decree by striking therefrom all provisions for the payment of money by him to the plaintiff for her support and maintenance, upon the ground that he obtained a decree of divorce in the State of Nevada on May 24, 1945, and that as of that day, he ceased to be liable for any future alimony payments for the plaintiff's maintenance and support.

The parties hereto married in Indiana on July 20, 1937.

They took up their residence in Queens County, State of New York, where they lived until April, 1942, at which time they separated. Plaintiff commenced an action for a separation on February 5, 1943, upon the ground that in the month of April, 1942, the defendant wilfully abandoned her. The defendant appeared generally by his attorney, who served a notice of appearance on February 10, 1943, but interposed no answer or otherwise contested the action. By an order of this court dated May 3, 1943, on notice to the defendant's then attorney, the plaintiff's application for judgment was duly referred to an official referee to hear and report to the court. Upon an inquest taken before the official referee on May 14, 1943, the attorney representing the defendant appeared in his behalf. At that time the plaintiff testified that the defendant abandoned her in the month of April, 1942, and never returned to their joint home. A stipulation theretofore duly executed by the parties and their attorneys was received in evidence and referred to in the record as providing, among other things, for the payment of alimony

to the plaintiff in the sum of \$180 per month, commencing March 1, 1943. On September 29, 1943, the learned official referee rendered his formal report, stating his findings of fact and conclusions of law to be as follows: "Findings of fact—1. That the plaintiff and the defendant were married on the 20th day of July, 1937, at Crown Point, Indiana. 2. That the plaintiff and the defendant at all times hereinafter mentioned, and at the time of the commencement of this action were and still are residents of the City and State of New York. 3. That in the month of April, 1942, the defendant wilfully abandoned the plaintiff and left the home maintained by the parties hereto at 40-45 Hampton Street, Elmhurst, Queens County, New York, without justification and without intention of returning. 4. That there is no issue of the marriage of the parties. 5. That the plaintiff and the defendant have entered into a separation agreement date March 16, 1943, as amended by a stipulation dated April 1, 1943, and further amended by a letter dated April 12, 1943, all of which have been received in evidence as one exhibit, marked Plaintiff's Exhibit 1. 6. That the defendant should pay to the plaintiff for her support and maintenance the sum of one hundred and eighty (\$180) dollars per month." Conclusions of law—"1. The plaintiff is entitled to a final judgment in her favor and against the defendant separating the plaintiff from the bed and board of the defendant forever because of the wilful abandonment of the plaintiff by the defendant. 2. The final judgment in favor of the plaintiff and against the defendant shall provide: (a) That the defendant pay to the plaintiff for her support and maintenance the sum of One Hundred and Eighty (\$180) Dollars per month."

The foregoing findings were included in the proposed counterfindings of fact and conclusions of law which the defendant's attorney submitted to the official referee with the consent of the attorney for the plaintiff indorsed thereon.

On October 11, 1943, this court, on motion of the defendant's said attorney, signed the judgment, with notice of settlement, submitted by said attorney. Therein the report of the official referee was duly confirmed, ratified and approved in all respects, and it was "Adjudged that the plaintiff, Gertrude Estin, be and she hereby is separated from the bed and board of the defendant, Joseph Estin, because of the wilful abandonment of said plaintiff by said

defendant, and it is further ordered, adjudged and decreed that the defendant, Joseph Estin, pay to the plaintiff, Gertrude Estin, for her support and maintenance, the sum of \$180 per month."

[fol. 129] According to the defendant, having disposed of his interest in a business with which he was connected and in order to get away from the scene of his "most unpleasant matrimonial experience," he decided in January, 1944, to go to California to live. On his way, however, he stopped in Reno, Nevada, among other places "and being pleased with living conditions and believing that this would be a pleasant and satisfactory place in which to live * * * decided to remain here" and took up his residence at the Hotel El Cortez in Reno, Nevada, where he continued to reside until November 9, 1944, with the exception of a number of trips of relatively short duration to other parts of the country for business reasons. On November 9, 1944, he moved to the Wynn Hotel in Reno, Nevada, where he has ever since continued to reside and where he is residing at the present time.

On April 17, 1945, some fifteen months after his arrival in Reno, Nevada, the defendant commenced an action for divorce against his wife, the plaintiff herein. Process was served upon her by publication pursuant to the provisions of the laws of the State of Nevada. The plaintiff did not appear in said action and upon her default, a judgment of absolute divorce was granted against her on May 24, 1945. In his complaint against the plaintiff herein, he made the following allegations in support of his prayer for a divorce: "IV. That there is no community property belonging to the plaintiff and the defendant in the State of Nevada, or elsewhere. The Supreme Court in and for the State of New York, County of Queens, did, on the 14th day of October, 1943, in an uncontested action, enter a decree of [fol. 130] separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof. V. That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation."

In the findings of fact and conclusions of law filed on May 24, 1945, the court found, in part, as follows: "IV. That there is no community property belonging to the plaintiff and the defendant in the State of Nevada or elsewhere. The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof. That said New York Supreme Court Judgment is not res adjudicata of the matters alleged in plaintiff's complaint. V. That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation," and directed judgment for an absolute divorce "on the ground that the [fol. 131] parties have lived separate and apart for a period of more than three consecutive years, without cohabitation." The decree of divorce was filed the same date. The transcript of the minutes of the inquest taken in the Nevada action on May 24, 1945, shows that the defendant herein testified that this court did on October 14, 1943, enter a decree "of separate maintenance" against him, which provided for the payment of alimony in the sum of \$180 per month, which he had paid up to the date of the said hearing. He then gave the following testimony: "Q. You allege in the fifth paragraph of your complaint that for more than three consecutive years next preceding the filing of your complaint and since the 14th day of April, 1942, you and the defendant have lived separate and apart and without cohabitation. Is that true? A. Yes. Q. What brought about the separation? A. Different reasons. One reason was there were no normal relationships between myself and my wife. Q. She completely denied you the ordinary marital relations or any cohabitation; is that true? A. Yes, sir. Q. What sort of a disposition did she have? A. Very disagreeable. Q. Did she make a home for you? A. No, sir. Q. And you finally got tired of that and left; is that right? A. Yes. Q. Was that on April 14, 1942? A. Yes, sir. Have you lived with or cohabited with her since that time? A. No."

There is presented for determination by this court two broad issues: (1) Did the defendant acquire a bona fide domicile in Nevada, thereby conferring jurisdiction on its courts to render the judgment of divorce? (2) Did that judgment supersede the prior separation decree which the [fol. 132] plaintiff obtained in New York State and terminate the defendant's liability to pay the alimony therein provided?

In December, 1942, the United States Supreme Court in *Williams v. North Carolina* (317 U. S. 287, 63 S. Ct. 207, 143 A. L. R. 1273) held that "when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter." The New York Court of Appeals in November, 1943, handed down its decision *In re Holmes* (291 N. Y. 261) and held that a foreign judgment of divorce "will be given full force and effect as a judgment in rem. dissolving the marriage of the plaintiff until impeached by evidence which establishes that the court had no jurisdiction over the res." Subsequently on May 21, 1945, the Supreme Court of the United States handed down its second decision in the *Williams* case (*Williams v. North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 157 A. L. R. 1366) and there held that the domicile of one spouse within a state gave power to that state to dissolve a marriage wheresoever contracted, "but only if the Court of the first state had power to pass on the merits—had jurisdiction, that is to render judgment"; that in short, "the decree of divorce is a conclusive adjudication of everything except the *jurisdictional facts upon which it is founded and domicile is a jurisdictional fact*" (italics supplied). [fol. 133] If the determination which must be here made were to turn solely upon the question whether the defendant's judgment of divorce was bottomed upon a bona fide domicile in the State of Nevada there would be no difficulty in view of the foregoing authorities.

According to the defendant he has, since January 1944, maintained no other place of residence than in Reno, Nevada. He became a registered voter in Washoe County, Nevada, on March 28, 1945, and since said time has voted

in said county. His federal income tax returns for the years 1944 and 1945 indicate his residence there. He paid the poll tax in the County of Washoe, Nevada, for the years 1944, 1945 and 1946. In January, 1945, and again in January, 1946, he paid a personal property tax to the said county. In 1944, and again in 1945, the defendant registered his automobile in the State of Nevada, and in 1946 he renewed his license on said car.

From the foregoing facts there seems to be no doubt that the defendant is now and since January, 1944, has been a bona fide resident of the State of Nevada and there is no evidence of any probative force in the record which would indicate anything to the contrary. The plaintiff urges, however, that the separation judgment rendered by this court was an absolute bar to the District Court of Nevada assuming jurisdiction over the matrimonial res of the parties and rendering a judgment of divorce against her, in the absence of her appearance therein.

There is much that can be said for this view. This court had jurisdiction of the marital res and of the parties thereto [fol. 134] when it rendered a judgment of separation in favor of the plaintiff against the defendant because of his abandonment in April, 1942. The plaintiff remained in New York, but the defendant soon thereafter established a new domicile in the State of Nevada. Since their separation was under a decree of this court which had jurisdiction of the parties and of the subject-matter, the plaintiff's domicile remained in New York, notwithstanding the new domicile acquired by the husband in Nevada. In such circumstances, the Appellate Division of this department indicated in October, 1943, that: "the wife having prevailed in the separation action because of the husband's fault, the matrimonial res remained with the wife in New York and the wrongdoer is disabled from moving the res out of New York so as to give jurisdiction thereof in any other State, in the absence of an appearance by the wife" (*Gibson v. Gibson*, Appeal No. 2, 266 App. Div. 975, 44 N. Y. S. 2d 372). An examination of the record on appeal in the *Gibson* case indicates, however, that the wife, who had obtained a decree of separation in this court, sought an allowance of counsel fees to enable her to defend an action for a declaratory judgment which her husband brought in the Supreme Court, New York County, to declare that a judgment of divorce which he obtained in a sister state, superseded the pre-

existing separation decree and absolved him from the necessity of supporting his wife.

Thereafter in *Canle v. Canle* (52 N. Y. S. 2d 618, not otherwise reported) Mr. Justice Hooley held, on the authority of the Gibson case (*supra*), that a foreign state court's decree [fol. 135] of divorce in favor of a husband, without appearance by the wife, did not bar sequestration of his property by the wife to assure continued payments of alimony awarded in the previous judgment of separation until the divorce decree has been successfully established in this court. The defendant in that case then moved for an order relieving him of making payments of alimony under the provisions of the judgment of separation. The matter came on before Mr. Justice Ughetta (52 N. Y. S. 2d 620, not otherwise reported). It was there held that the husband had not presented facts sufficient to establish the jurisdictional efficacy of the divorce obtained by him in the sister state and accordingly his motion was denied.

Thus the foregoing decisions establish the principle that until the divorce decree rendered in the sister state in favor of the husband has been successfully established in the courts of this state, which duly rendered the prior separation judgment in favor of the wife, such separation judgment is not affected or automatically set aside by such divorce decree. This is in accord with the holdings of the federal courts in *Durlacher v. Durlacher* (123 F. 2d 70), and *Bassett v. Bassett* (141 F. 2d 954, certiorari denied, 323 U. S. 718).

Inasmuch as the United States Supreme Court, in the first Williams case, banished the doctrine of "matrimonial domiciles" from consideration and held that bona fide domicile of one spouse within a state gave the power to that state to dissolve a marriage wheresoever contracted, the plaintiff's rights, if any, must be founded on a different principle than [fol. 136] the dictum enunciated in the Gibson case (*supra*).

In the stipulation executed by the parties herein and their attorneys on March 16, 1943, which was adverted to in the fifth finding of fact contained in the report of the official referee of this court, dated September 29, 1943, it was provided, in part, as follows: "1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the court: (a) That the defendant shall pay to the plaintiff the sum of \$180.00 per month as alimony for the support and maintenance of the

plaintiff herein. (b) That the defendant shall pay the sum of \$500.00 as the reasonable counsel fee of Edwin C. Morsch, attorney for the plaintiff for his services herein. 2. That the aforesaid sum of \$180 per month permanent alimony shall commence as of the first day of March, 1943. 3. That the aforesaid sum of \$500 counsel fee shall be paid simultaneously with the signing of this stipulation. 4. In the event that the plaintiff herein at any time hereafter shall institute an action for divorce, the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action. 5. That the defendant hereby consents that if such decree of separation is entered herein, it shall contain a provision, subject to the approval of the court: that the [fol. 137] defendant be restrained and enjoined for leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff, in any other State or foreign country, and enjoining and restraining the defendant from thereupon instituting any such action for divorce against the plaintiff in any such jurisdiction other than the State of New York, except that the foregoing shall not apply in the event that the plaintiff shall establish her residence outside of the State of New York."

Although the official referee struck from the proposed counterfindings of fact and conclusions of law presented by the defendant's then attorney all provisions of said stipulation, as well as the supplemental stipulations dated April 1 and 12, 1943, incorporated therein, with the exception of the provision for the payment of maintenance in the sum of \$180 per month, it is clear that the support and maintenance which was provided in the decree was based upon the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. It is difficult to perceive how the property rights thus established in plaintiff's favor could be wiped out by the subsequent decree of divorce obtained in a sister state by one of the parties to the agreement without the presence of or appearance by the other therein.

Assuming, for the purpose of this discussion only, that the provisions of the stipulations referred to, so as far as

adopted in the findings of this court, merged in its decree, it does not necessarily follow that the divorce obtained by [fol. 138] the husband in Nevada, jurisdictionally efficacious to dissolve the marital status of the parties, has extra-territorial effect upon the provisions for the maintenance and support contained in the pre-existing separation decree of this court, which is entitled equally with the decree of the State of Nevada to the protection of the full faith and credit clause of the federal constitution. This court acquired and retains jurisdiction in personam over the husband as an incident to the judgment of separation which it rendered upon the appearance of both parties therein. The State of New York had and continues to have an interest in the abandoned wife in whose favor its courts have rendered judgment, who continues to reside within its borders, and who may become a public charge should the defendant be freed of his obligation to support her. Under these circumstances, this court is not powerless and refuses to strike from its decree the provisions for the support of the plaintiff.

Mr. Justice Douglas, who wrote the prevailing opinion in the first Williams case, handed down a concurring opinion in *Esenwein v. Commonwealth of Pennsylvania ex rel. Esenwein* (325 U. S., 279, 65 Sup. Court, 1118) which was decided the same day on which the second Williams case was decided. He there pointed out that it was important to keep in mind the basic difference between the problem of marital capacity and the problem of support and that the first Williams case involved marital capacity. He then had this to say: " * * * Quite different considerations would have been presented if North Carolina had [fol. 139] merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse — whom the decree of divorce is obtained appears or is personally served. See *Yarborough v. Yarborough*, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924; *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518. But I am not convinced that in absence of

an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. (See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.) The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. See *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 447, 64 S. Ct. 208, 217, 88 L. ed. 149, 150 A. L. R. 413 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two states. See *Williams v. North Carolina*, *supra*. One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The state where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is [fol 140] required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all. See *Radin, The Authenticated Full Faith and Credit Clause*, 39 Ill. L. Rev. 1, 28." Mr. Justice Black joined in this opinion. Mr. Justice Rutledge, concurring, stated in part: " * * * In doing so, however, it is appropriate to indicate my agreement with the views expressed in the concurring opinion of Mr. Justice Douglas that the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect."

It follows that the defendant's motion to modify the decree of separation rendered by this Court so as to eliminate the provisions therein for the plaintiff's support is denied. The motion of the plaintiff for leave to enter a judgment for the arrears of alimony to date, with interest, is granted as prayed for.

Section 1172-d of the Civil Practice Act empowers this Court to require in its discretion "the husband to pay the wife's expenses in bringing, carrying on or defending * * *" any action or proceeding "to compel the payment of any sum of money required to be paid by a judgment

or order entered in an action for divorce, separation, [fol. 141] annulment or declaration of nullity of a void marriage * * *." Specifically included in said subdivision is a proceeding, pursuant to Section 1171-b of the Civil Practice Act, which is the section pursuant to which the plaintiff moves for leave to enter judgment. Under the provisions of this statute, the Court allows the plaintiff a counsel fee, in connection with these proceedings, in the sum of \$250. Proceed on notice.

[fol. 142] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of proper and correct copies of the notice of appeal, the order and judgment appealed from and all the papers upon which the Court below acted in making the order and judgment appealed from, and the whole thereof now on file in the office of the Clerk of the Supreme Court, Queens County. Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, September —, 1946.

Wing & Wing, Attorneys for Defendant-Appellant-Respondent. Roy Guthman, Attorney for Plaintiff-Respondent-Appellant.

[fol. 143] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

NOTICE OF APPEAL

SIRS:

Please Take Notice that the defendant hereby appeals to the Court of Appeals of the State of New York from a Judgment entered herein in the office of the Clerk of the County of Queens on the 20th day of November, 1946, in favor of the plaintiff and against the defendant, affirming upon an order of the Appellate Division of the Supreme

Court, Second Department, a Judgment heretofore entered herein in favor of the plaintiff and against the defendant on the 12th day of August, 1946, in the sum of \$2,441.90, and also for the sum of \$61.34 costs, and that [fol. 144] the defendant appeals from each and every part of said judgment.

Dated: New York, N. Y., January 17, 1947.

Yours, etc., Wing & Wing, Attorneys for Defendant,
Office & P. O. Address, 225 Broadway, Borough
of Manhattan, City of New York.

To: Roy Guthman, Esq., Attorney for Plaintiff, Office
& P. O. Address, 11 West 42nd Street, Borough of Man-
hattan, City of New York. County Clerk of Queens County.
[fol. 145] At a Term of the Appellate Division of the
Supreme Court of the State of New York held in and for
the Second Judicial Department at the Borough of Brook-
lyn, on the 12th day of November, 1946.

Present: Hon. Harry E. Lewis, Presiding Justice; Hon.
William F. Hagarty, Hon. William B. Carswell, Hon. Ray-
mond E. Aldrich, Hon. Gerald Nolan, Justices.

Order on Appeals from Resettled Order and Judgment
(One Paper)

GERTRUDE ESTIN, Respondent-Appellant,

vs.

JOSEPH ESTIN, Appellant-Respondent

ORDER OF AFFIRMANCE

The above-named Joseph Estin, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a resettled order and judgment (one paper) of the Supreme Court dated and entered in the office of the Clerk of the County of Queens the 12th day of August, 1946, granting plaintiff's motion for judgment for arrears of alimony directed to be paid to her under a judgment of separation dated October 11, 1943, and denying [fol. 146] defendant's cross motion to modify said judgment of separation, etc., and the above named Gertrude Estin, the plaintiff, having also appealed from said resettled order and judgment (one paper), insofar as same

determines that the local court in Nevada had jurisdiction to grant the defendant a divorce from plaintiff on May 24th, 1944, etc., herein, and the said appeals having been argued by Mr. James G. Purdy of Counsel for appellant-respondent, and argued by Mr. Roy Guthman of Counsel for respondent-appellant, and due deliberation having been had thereon:

It is Ordered and Adjudged that the resettled order and judgment (one paper), so appealed from, be and the same hereby is unanimously affirmed, with \$10 costs and disbursements to plaintiff.

Enter:

John J. Callahan, Clerk.

[fol. 147] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

M712—1943

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

JUDGMENT OF AFFIRMANCE

An appeal having been taken to the Appellate Division of the Supreme Court for the Second Judicial Department from a Judgment and resettled Order of the Supreme Court, Queens County, entered in the office of the Clerk of Queens County on the 12th day of August 1946 in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and said appeal having been heard and the said Appellate Division having by an order entered in the office of the Clerk of said Appellate Division on the 12th day of November unanimously affirmed said judgment with \$10.00 costs of said appeal and the disbursements to the plaintiff and the record on said appeal together with a certified copy of said order having been remitted to the office of the Clerk of the County of Queens, and the costs and disbursements having been duly taxed in the sum of \$61.34, it is on motion of Roy Guthman, Esq., attorney for the plaintiff

Adjudged that the judgment and re-settled Order of this court entered on the 12th day of August 1946 be and the

[fol. 148] same hereby is affirmed with \$10.00 costs and disbursements and it is further

Adjudged that the plaintiff, Gertrude Estin, do recover of the defendant, Joseph Estin, the sum of \$10.00 costs and \$51.34 disbursements, a total of \$61.34, as taxed, and that the plaintiff have execution therefor.

Dated, Jamaica, N. Y., November 20, 1946.

Paul Livoti, Clerk.

[fol. 149] IN COURT OF APPEALS OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the sixteenth day of January A. D. 1947.

Present: Hon. John T. Loughran, Chief Judge, presiding.

GERTRUDE ESTIN, Respondent,

vs.

JOSEPH ESTIN, Appellant

ORDER DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF
APPEALS

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that an appeal lies as of right upon a constitutional question.

(See Section 588, subd. 1-a, Civil Practice Act.)

A Copy

Raymond J. Cannon, Deputy Clerk.

[fol. 150] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

James G. Purdy, being duly sworn, deposes and says: I am a member of the firm of Wing & Wing, the attorneys for the defendant-appellant in this action and am familiar with all the proceedings herein.

No opinion was rendered by the Appellate Division of the Supreme Court, Second Department, on affirming the judgment appealed from herein.

James G. Purdy.

Sworn to before me this 28th day of January, 1947.
Gwendolyn Purdy, Notary Public, State of New York. Residing when appointed in Westchester County. Cert. filed in N. Y. Co. Clk.'s No. 489, Reg. No. 277-P-7. Commission expires March 30, 1947.

[fol. 151] STIPULATION WAIVING CERTIFICATION OF RECORD
TO THE COURT OF APPEALS

It Is Hereby Stipulated that the foregoing are true copies of the Judgment Roll and Record on Appeal to the Appellate Division of the Supreme Court, the Order of Affirmance, the Judgment of Affirmance, and the Notice of Appeal therefrom, all of which are now on file with the Clerk of the County of Queens and certification thereof is hereby waived.

Dated: New York, N. Y., January 28th, 1947.

Roy Guthman, Attorney for Plaintiff-Respondent.
Wing & Wing, Attorneys for Defendant-Appellant.

[fol. 151-A] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of April, in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

GERTRUDE ESTIN, Respondent,
against

JOSEPH ESTIN, Appellant

REMITTITUR—April 18, 1947

Be it Remembered. That on the 5th day of February in the year of our Lord one thousand nine hundred and Forty-seven, Joseph Estin, the appellant in this cause, came here unto the Court of Appeals, by Wing & Wing, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Gertrude Estin, the respondent in said cause, afterwards appeared in said Court of Appeals, by Roy Guthman, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 151-B] Whereupon, The said Court of Appeals having heard this cause argued by Mr. James G. Purdy of counsel for the appellant, and by Mr. Roy Guthman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 18, 1947.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 151-C] IN COURT OF APPEALS OF NEW YORK

GERTRUDE ESTIN, Respondent,

v.

JOSEPH ESTIN, Appellant

OPINION—Decided April 18, 1947

LOUGHRAN, *Ch. J.* The parties were married in 1937, and thereupon took up their home in this State where they lived together until April, 1942, when the husband left the wife. In February, 1943, she brought against him in the New York Supreme Court this action for a separation. (See Civ. Prac. Act, art. 69.) He entered a general appearance but offered nothing in the way of denial or defense. Upon a finding that he had abandoned her in April, 1942, a judgment of separation was granted to her in October, 1943, and thereby she was awarded permanent alimony of \$180 per month—an amount that had been recommended in a stipulation filed with the court by the respective counsel for both parties. There was no issue of the marriage.

In January, 1944, the husband went to the State of Nevada where in April, 1945, he instituted an action against the wife for an absolute divorce. The summons and complaint therein were delivered to her in this State where she

remained domiciled. After she had failed to respond to that constructive service, and in May, 1945, a final decree of divorce—without any award of alimony—was granted to the husband by the Nevada court, “on the ground of three years continual separation, without cohabitation.”

Up to that time, payments of alimony had been made by the husband pursuant to the prior New York judgment of separation. Upon the recording of his Nevada decree, however, he stopped such payments, with the result that in February, 1946, the wife sought an order directing entry in this action of a supplementary judgment “for the amount of such arrears.” (See Civ. Prac. Act, § 1171-b.) In opposing that application, the husband, invoking the full faith and credit clause of the Constitution of the United States (art. IV, § 1), demanded (1) a declaration of the unqualified superiority of his Nevada divorce decree over the prior New York judgment of separation, and (2) an order eliminating the support provisions of that prior judgment as of May 24, 1945, the date of the Nevada decree.

At Special Term the motion made by the wife was granted, the cross motion made by the husband was denied, and accordingly judgment in her favor was directed against him for arrears of alimony amounting to \$2,340. An affirmance by the Appellate Division followed. The husband then applied to this court for leave to bring the determination [fol. 151-E] of the Appellate Division here for review; leave was denied as unnecessary, since the award of arrears of alimony to the wife was in effect a new final judgment and the construction of the full faith and credit clause was directly involved (see 296 N. Y. 828); so the case is now before us on an appeal which the husband has taken as of right from the affirmance of the Appellate Division. (See Civ. Prac. Act, § 588, subd. 1, par. a.)

Special Term found that “the defendant is now and since January, 1944, has been a bona fide resident of the State of Nevada”. The proof upon which this finding rests is ample. Hence we are concluded by the affirmance thereof. Hence, too, there is no denying the jurisdictional validity of the Nevada divorce decree, because the domicile of one spouse within a State gives power to that State to dissolve a marriage wheresoever contracted (*Williams v. North Carolina*, 325 U. S. 226, 229-230). Although in this New York separation action, the husband was adjudged to have been solely to blame when he abandoned the wife in April,

1942, yet the Nevada Court was not thereby disabled from granting him an absolute divorce in May, 1945, upon the ground of his having then lived apart from the wife for a period of three years, without cohabitation. For the Nevada statutes authorize the granting of a divorce upon that ground no matter where the fault may lie (Nevada Compiled Laws, § 9467.06), and it is not for us to inquire into the merits of such an exercise of State power. (*Williams v. North Carolina*, 317 U. S. 287, 300-301; 325 U. S. 226.)

We have then this situation: The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage; and the only remaining question is whether the Nevada decree must also be taken to have cancelled the alimony provision made for the wife through the prior judgment in this New York separation action.

A divorce decree (whether foreign or domestic) granted by a court having jurisdiction of the persons of both parties may very well be held to override any incongruous alimony provision of an earlier domestic judgment of separation. (See *Scheinwald v. Scheinwald*, 231 App. Div. 757; *Richards v. Richards*, 87 Misc. 134, affd. 167 App. Div. 922; *Holmes v. Holmes*, 155 F. 2d 737.) But the *res judicata* principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted the last judgment was without jurisdiction of the person of the defendant (cf. *Miller v. Miller*, 200 Iowa 1193; *Wagster v. Wagster*, 193 Arkansas 902; 2 Freeman on Judgments [5th ed.], § 629). For like reasons of estoppel, a wife who procures a foreign divorce decree may in that way perhaps relieve her husband from any further obligation to support her. *Harris v. Harris* (197 App. Div. 646) was a case of that kind; it does not reach the issue now before us. (See *Krause v. Krause*, 282 N. Y. 355.)

Nor is that issue ruled by *Esenwein v. Commonwealth ex rel. Esenwein* (325 U. S. 279), as we see it. In the *Esenwein* case, a husband, relying upon a Nevada divorce decree, applied to a Pennsylvania court for revocation of a prior Pennsylvania order for the support of his wife. According to Pennsylvania law, such a support order did not survive divorce. With that rule of the local law as a premise, the Supreme Court of the United States said: "The Full Faith and Credit Clause placed the Pennsylvania Courts under a

duty to accord *prima facie* validity to the Nevada decree. * * * The Pennsylvania Supreme Court rightly indicated [fol. 151-G] that if merely the Nevada decree had been in evidence, it was entitled to carry the day." (325 U. S. at pp. 280-281.) Hence in the *Esenwein* case, as the court said, the efficacy of the Nevada divorce in Pennsylvania was the decisive question.

On the other hand, *Barber v. Barber* (21 How. [U. S.] 582) is here an authority much in point, as we believe. In that case, a wife was granted a judgment of separation by the Court of Chancery of this State where both parties were domiciled at the time. The judgment directed payment of alimony in quarterly installments. Without making any payment thereof, the husband went to Wisconsin where he procured an absolute divorce. Thereafter the wife had judgment for the unpaid alimony in a suit brought by her in the District Court of the United States for the District of Wisconsin. On appeal by the husband, the Supreme Court of the United States rejected his claim that his Wisconsin divorce decree had extinguished his liability for alimony under the New York judgment of separation. The court said: "It is not necessary for us to pass any opinion upon the legality of the [Wisconsin divorce] decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

[fol. 151-H] The ruling so laid down by the highest court in the land is akin to decisions of our own. In *Livingston v. Livingston* (173 N. Y. 377), we held that alimony unconditionally and finally owing to a wife under a matrimonial decree is a vested property right of which she may not be deprived even by way of an act of the Legislature; and in *Jackson v. Jackson* (290 N. Y. 512), we held that a court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife. Counsel have cited no Nevada statute or decision to the contrary nor any

Nevada case in which a divorce granted in that State against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the State of her domicile. Consequently, as we shall assume, the common law of Nevada does not differ in that regard from the common law of New York. (See *Read v. Lehigh Valley R. R. Co.*, 284 N. Y. 435, 441-442; Restatement, Conflict of Laws, § 622). On that basis and in the light of *Barber v. Barber* (*supra*) we conclude that the full faith and credit clause affords no reason for disapproval by us of the decision reached herein by the courts below.

The judgment should be affirmed, with costs.

LEWIS, CONWAY, DESMOND, THATCHER, DYE and FULD, JJ.,
concur.

Judgment affirmed.

[fol. 152] At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Queens at the General Court House of Queens County on Sutphin Boulevard, in Jamaica, New York, on the 14th day of May, 1947,

Present: Hon. Francis G. Hooley, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

ORDER MAKING THE JUDGMENT OF THE COURT OF APPEALS THE
JUDGMENT OF THE NEW YORK SUPREME COURT, QUEENS
COUNTY

The above-named defendant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered on the Order of the Appellate Division of the Supreme Court, Second Department, in the Office of the Clerk of the County of Queens on the 20th day of November, 1946, affirming the judgment in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and granting to the plaintiff-respondent judgment for \$61.34, costs and disbursements in the Appellate Division, and from each and every part of said judgment of affirmance and order of affirmance and

from said judgment for costs and disbursements, as well as from the whole thereof; and the said appeal having been [fol. 153] duly argued at the said Court of Appeals and after due deliberation the Court of Appeals, having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed and judgment entered for the plaintiff with costs and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law:

Now on reading and filing the remittitur from the said Court of Appeals herein, and on the notice of motion with proof of due service thereof, and upon motion of Roy Guthman, attorney for the plaintiff herein, it is hereby,

Ordered that the order and judgment of the said Court of Appeals be and the same are hereby made the order and judgment of this Court.

Enter

Francis G. Hooley, J. S. C.

J. W. N. S.

Granted May 14th, 1947.

Paul Livoti, Clerk.

[fol. 154] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

JUDGMENT

The above named defendant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the Office of the Clerk of the County of Queens on the 20th day of November, 1946, affirming the judgment in favor of the plaintiff and against the defendant heretofore entered in the office of the said clerk on the 12th day of August, 1946, in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and granting to the plaintiff costs and disbursements in the Appellate Division in the sum of \$61.34 which

was entered herein in the office of the Clerk of Queens County on the 20th day of November, 1946, and from each and every part of said Judgment of said judgment of affirmance and order of affirmance as well as from the whole thereof; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged [fol. 155] that the said judgment so appealed from as aforesaid be affirmed and judgment rendered for the plaintiff with costs and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court, there to be proceeded on according to law; and the remittitur from said Court of Appeals having been duly filed herein and the Order, having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Roy Guthman, Esq., attorney for the plaintiff herein, it is hereby

Adjudged that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court, and it is further

Adjudged that the judgment entered herein on August 12th, 1946, be and the same is hereby affirmed and it is hereby

Adjudged that the judgment and order of the Appellate Division entered herein on the 20th day of November, 1946, for \$61.34 be and the same is hereby affirmed and it is further

Adjudged that the plaintiff Gertrude Estin recover of the defendant, Joseph Estin, the sum of \$93.10, the amount of her costs in the Court of Appeals, as taxed, and that she have execution therefor.

[fol. 156] Judgment signed and entered herein this 15th day of May, 1947, at 11:55 A. M.

Paul Livoti, Clerk.

Gertrude Estin, 353 W. 57th Street, c/o Henry Hudson Hotel, Borough of Manhattan, New York City.

Joseph Estin, c/o Hotel Wyn, Reno, Nevada.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 157] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

ORDER ALLOWING CERTIORARI—December 15, 1947

A motion for leave to file a petition for rehearing and petition for rehearing having been submitted in this case:

Upon consideration thereof, it is ordered by this Court that the motion for leave to file and petition for rehearing be, and they are hereby, granted.

It is further ordered that the order entered October 13, 1947, denying the petition for certiorari be, and it is hereby, vacated; and that the petition for writ of certiorari herein be, and it is hereby, granted. The case is consolidated for argument with Kreiger vs. Kreiger, No. 371, and a total of three hours is allowed for oral argument of the consolidated cases.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,367. New York Court of Appeals. Term No. 139. Joseph Estin, Petitioner, vs. Gertrude Estin. Petition for a writ of certiorari and exhibit thereto. Filed June 18, 1947. Term No. 139 O. T. 1947.

FILE COPY

Office - Supreme Court, U.

FILED

JUN 18 1947

Supreme Court of the United States

October Term 1946.

No. **103**

139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

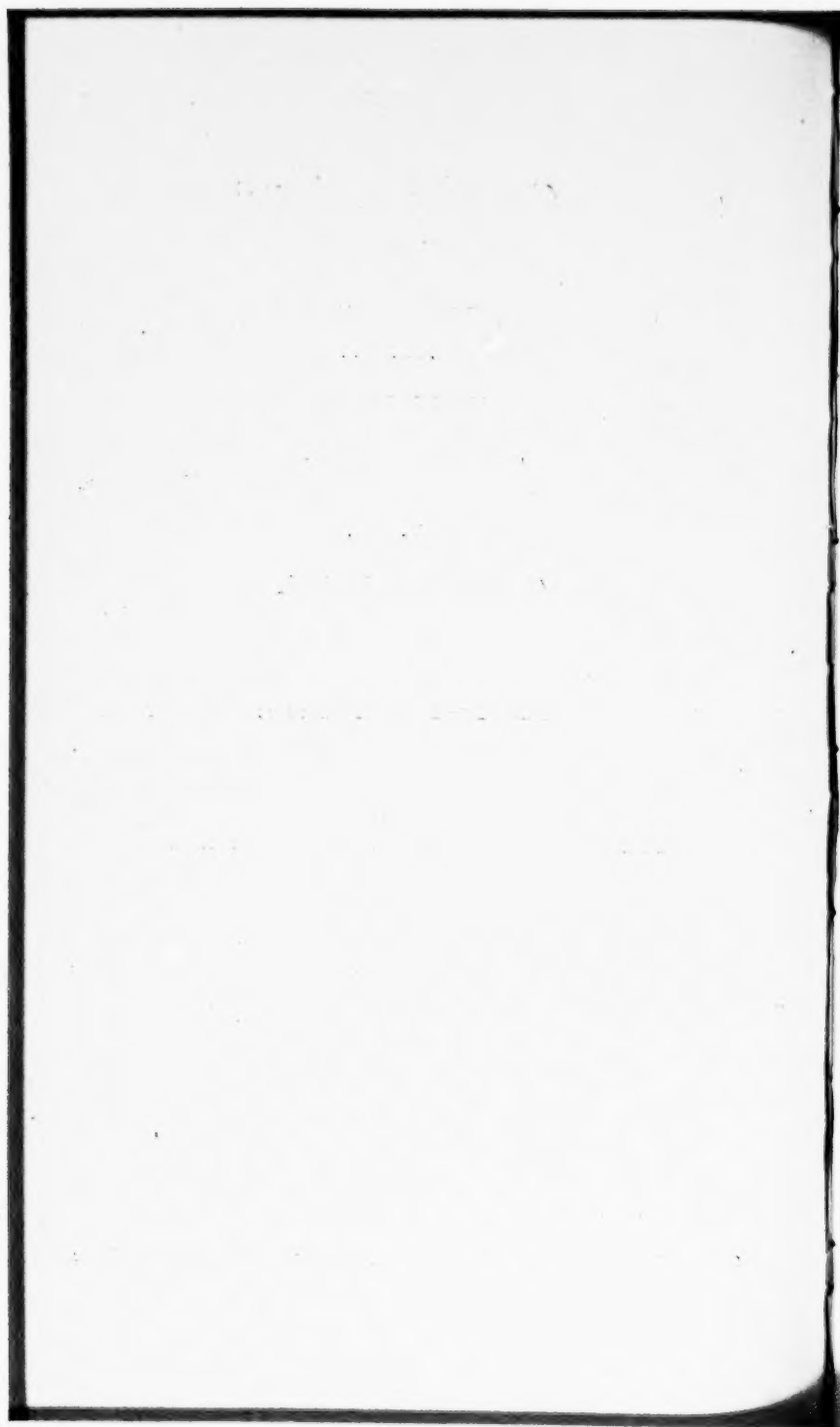
Petition and Brief in Support of Writ of Certiorari to
the Court of Appeals of the State of New York.

GEORGE S. WING,

AK JAMES G. PURDY,

ABRAHAM J. NYDICK,

Counsel for Petitioner.



SUBJECT INDEX.

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Supreme Court of the United States

OCTOBER TERM 1946.

JOSEPH ESTIN,
Petitioner,

v.

GERTRUDE ESTIN,
Respondent.

No.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York, made April 18, 1947.

Opinions Below.

The opinion of the Special Term of the Supreme Court of the State of New York on granting the respondent judgment for arrears of alimony is published in 63 New York Supplement, 2d Series, 476, and appears at R. 126-141. The opinion of the Court of Appeals has not yet been reported in the official reports; a copy appears at R. 157. No opinion was written by the Appellate Division of the Supreme Court.

Jurisdiction.

The remittitur of the Court of Appeals is dated April 18, 1947 (R. A-1), and this petition is presented within three months from the date thereof. Jurisdiction is invoked under Section 237 (b) of the Judicial Code as amended February 13, 1925.

Questions Presented.

Do the provisions of Art. IV, Section 1, of the United States Constitution require that the State Courts of New York give the same effect to the valid divorce obtained by petitioner in Nevada upon due notice of process served personally on the respondent in New York, and not upon the service of process on the respondent within the jurisdiction of the Nevada Court, and without her personal appearance in that action, as would be given had the respondent been personally served within that jurisdiction or had appeared in that action?

Do the decisions of the State Courts of New York, made before the decision of this Court in *Williams v. North Carolina*, 317 U. S. 287, adjudging that the liability of a husband to pay alimony under a separation decree made in a New York Court terminates without qualification when a valid divorce is granted by a Court in any state, fix the New York law as to such liability in and require it to be applied to this case?

Statement.

On October 11, 1943, respondent, then the wife of petitioner, obtained a judgment of separation in the New York Supreme Court, Queens County, after personal service of process and his personal appearance in the action, on the ground of the wilful abandonment of the respondent by petitioner and which decree awarded respondent

\$180.00 per month for her support and maintenance (R. 20).

In January, 1944, petitioner became and ever since has been and now is domiciled in Nevada (R. 62, 385).

On May 24th, 1945, the petitioner obtained a decree of divorce against the respondent in the Second Judicial District Court of the State of Nevada in and for the County of Washoe (R. 65), upon the ground of continual separation without co-habitation for three years (R. 66).

The respondent was served personally in New York State with the summons in said action and a certified copy of the complaint on April 20, 1945 (R. 60), but she failed to appear in said action and defaulted therein (R. 70).

In March, 1946, respondent moved at Special Term of the New York Supreme Court, Queens County, pursuant to Section 1171 B of the New York Civil Practice Act for a money judgment for the arrears of alimony required to be paid by the New York decree on the 5th day of June, 1945, and thereafter to and including February, 1946 (R. 14, 15). Petitioner opposed that motion and made a counter-motion under Section 1170 of the Civil Practice Act of New York to strike the alimony provisions from the alimony decree, relying upon his divorce decree obtained in Nevada evidenced by a duly exemplified copy of the record in that case (R. 67-81). Petitioner's motion was denied and respondent's motion was granted by the said Special Term (R. 126, 141), and an order and judgment was entered thereon July 9th, 1946 awarding the respondent \$2,441.90 (R. 7, 11).

Upon appeal, the said judgment and order was unanimously affirmed by the Appellate Division of the Supreme Court, Second Judicial Department (R. 145), and judgment of affirmance was entered in the sum of \$61.34 costs on November 20, 1946 (R. 147).

Upon appeal to the Court of Appeals, the said judgment was affirmed by its remittitur made the 18th day of

April, 1947, and the record remitted to the Supreme Court, Queens County, for enforcement (R. A-1).

Chief Judge Loughran wrote an opinion in the Court of Appeals, concurred in by the other Judges (R. 157), wherein it was held that the divorce decree granted the petitioner by the Nevada Court was valid, but further held that Article IV, Section 1, of the United States Constitution did not require that the New York Courts must hold that the petitioner's liability to pay alimony to the respondent pursuant to her New York separation decree ceased when the status of husband and wife ended. This was on the theory that the respondent, not having been served with process in the Nevada action within that state, nor having appeared therein, a personal right to continue to receive alimony under the New York separation decree survived the dissolution of the marriage of the Nevada Court (R. 161, 162).

Reasons for Granting the Writ.

1. The record presents a question of nation-wide importance; a question which seemed to have been answered by the decision of this Court in *Esenwein v. Commonwealth of Pennsylvania*, 325 U. S. 279, but which the Court of Appeals of the State of New York declined to follow, holding that the earlier decision of this Court made in *Barber v. Barber*, 21 Howard (62 U. S.) 582, was more applicable to the facts at bar. The opinion of the Court of Appeals quoted the only paragraph in the opinion in that case relating to the effect of a foreign divorce upon the alimony provisions of a New York separation decree, a statement made with no citation of authority to support it. The Court of Appeals cited no New York decision in support of or recognizing the authority of the *Barber* decision upon the law of New York.

2. The decisions in New York made prior to the decision in *Williams v. North Carolina*, 317 U. S. 287, held that a valid divorce decree ended the right of the woman to collect alimony from her former husband under a pre-existing separation decree and are of the same type as respects the manner in which the divorce was obtained as are the Pennsylvania cases cited by the majority opinion of this Court in *Esenwein v. Commonwealth of Pennsylvania* (*supra*) as fixing the law of that Commonwealth.

3. Does the old decision in *Barber v. Barber* (*supra*), made with no citation of authorities, or the recent decision in the *Esenwein* case, correctly state the effect of a divorce decree upon the alimony provisions of a pre-existing separation decree to be applied in this case?

4. The Common Law of New York is that an absolute divorce terminates the liability of a former husband for the support of his divorced wife. In such a case where the Court of Appeals of New York finds that a decree of absolute divorce was validly entered in Nevada in the husband's suit, is New York required under Article IV, Section 1, of the United States Constitution to give full faith and credit to the Nevada decree in applying the Common Law of New York?

5. The confusion which results from the decision of the Court of Appeals in preferring the decision of this Court in the *Barber* case to that of this Court in the *Esenwein* case can only be cleared up by this Court.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and that the Judgment below be reviewed.

Respectfully submitted,

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Petitioner and Respondent were legally divorced in Nevada. The Court of Appeals of the State of New York in its Opinion in this case so held (R. 159).

The Common Law of New York is that the duty of a husband to support his wife terminates when the relation of husband and wife ends.

Scheinwald v. Scheinwald, 231 App. Div. 757, 246 N. Y. S. 33;

Richards v. Richards, 87 Misc. Rep. 134, 149 N. Y. Sup. 1028;

Solotoff v. Solotoff, 51 N. Y. Sup. 2d 514 (not reported officially).

No Common Law power exists in the Courts of New York State to compel a man to support an ex-wife; such a right is based on statute alone.

Romaine v. Chauncey, 129 N. Y. 566 at 571;

Erkenbrach v. Erkenbrach, 96 N. Y. 456.

The only statutory provisions in New York for such support are §1155 of the Civil Practice Act when a divorce is granted a wife, and §7.5 of the Domestic Relations Law when a husband seeks a divorce based on the incurable insanity of his wife.

The respondent has no vested right under New York law to the alimony awarded by her separation decree, either as to past due or future installments.

The citation of *Livingston v. Livingston*, 173 N. Y. 377, by the Court of Appeals in its Opinion to the contrary was clearly a mistake.

When the decree of absolute divorce in that case was made in 1892, no court had any power to modify the ali-

mony provisions thereof. In 1900, the Code of Civil Procedure was amended to permit a court to amend such provisions whether the judgment was "heretofore or hereafter rendered". Hence the Court of Appeals held the wife's right under the decree in that action made in 1892 was a vested one.

When the decree in the instant case was granted, Section 1170 of the Civil Practice Act gave power to the court to modify alimony provisions of a judgment as to both past due and future installments, and this provision has been declared valid by the Court of Appeals.

Karlin v. Karlin, 280 N. Y. 32, 36;

Fox v. Fox, 263 N. Y. 68, 70.

Livingston v. Livingston, was cited in the *Karlin* case (p. 36) as being not in point, having concern with a judgment entered before the above amendment.

See:

Sistare v. Sistare, 218 U. S. 1.

The Common Law of New York is the same as the Law in Pennsylvania, in that the alimony or support provisions of a separation or support decree do not survive a subsequent valid divorce and the decision in Esenwein v. Pennsylvania, 325 U. S. 279, is in point.

The Pennsylvania cases cited by this Court in *Esenwein v. Commonwealth of Pennsylvania*, to wit, *Commonwealth v. Parker*, 59 Pa. Superior Ct. 74, and *Commonwealth v. Kurniker*, 96 Pa. Superior Ct. 553, consider divorces based on similar facts as to service of process on and appearance by the defendants as those of New York State cited in the Opinion of the Court of Appeals in attempting to differentiate this case from the *Esenwein* case.

The Nevada Courts have applied the same rule as was recognized by the prevailing opinion of this Court in Esenwein v. Commonwealth of Pennsylvania.

Herrick v. Herrick, 55 Nev. 59, 68.

It is the law in New York that the support or alimony provisions of a separation decree are merely incidental thereto. Unless a separation decree is granted the wife, no alimony may be awarded her.

Johnson v. Johnson, 206 N. Y. 561;
Ainsworth v. Ainsworth, 239 App. Div. 258.

In New York, alimony is not a debt due a wife but a general duty of support made specific and measured by the Court arising out of the marriage relationship and ends when that relationship ends.

Faversham v. Faversham, 161 N. Y. App. Div. 521;

Romaine v. Chauncey, 129 N. Y. 566;

Wetmore v. Markoe, 196 U. S. 68.

Under the cases cited, it follows that if the judgment of separation necessary to sustain the support provisions of the judgment is superseded by a decree dissolving the marriage, the prior alimony or support provisions thereof are also superseded by that decree, as they end with the separation judgment to which they are ancillary and without which they have no validity.

In Conclusion.

The Courts of the State of New York have failed to give to the divorce decree obtained by Petitioner in Nevada the full faith and credit required by Art. IV, Sec. 1, of the United States Constitution, and the Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE S. WING,
 JAMES G. PURDY,
 ABRAHAM J. NYDICK,
Attorneys for Petitioner.

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CHARLES ELMORE GROFFLEY
CLERK

Supreme Court of the United States

October Term, 1947.

No. 139.

JOSEPH ESTIN,

Petitioner,

vs.

GERTRUDE ESTIN,

Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE S. WING,
JAMES G. PURDY,
✓ **ABRAHAM J. NYDICK,**
Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1947.

JOSEPH ESTIN,
Petitioner,

vs.

GERTRUDE ESTIN,
Respondent.

No. 139.

PETITIONER'S REPLY BRIEF.

Respondent has filed a verbose brief of 24 pages, in an attempt to convince this Court that no issue is presented by the record requiring consideration by this Court.

A careful study of that brief indicates that respondent relies on two alleged propositions of law:

1. That *Barber v. Barber*, 21 How. (62 U. S.) 582, is controlling; and

2. That Mr. and Mrs. Estin had entered into a separation agreement, the provisions of which, so far as alimony is involved, were made a part of the separation decree, and hence, under New York Law, is not affected by the divorce decree entered in Nevada; also—

3. That respondent has misinterpreted many decisions of this Court.

1.

Respondent ignores the effect of this Court's decision in *Esenwein v. Commonwealth of Pennsylvania*, 325 U. S.

279, and relies on the old case of *Barber v. Barber*, *supra*, as did the Court of Appeals, in its opinion, in this case.

Barber v. Barber, 62 U. S. (21 How.) 589, was quoted in *Haddock v. Haddock*, 201 U. S. at 571, as an authority for the decision there made, as follows:

“But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities or the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers” (p. 589).

Hence it is clear that a basic principle upon which *Barber v. Barber* was decided was considered by this Court in *Haddock v. Haddock* to be an authority and precedent upon which the latter was decided, a principle expressly overruled in *Williams v. North Carolina*, 317 U. S. 287.

In the opinion in the *Barber* case, the Court says (p. 589):

“the defendant had made his application to the Court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that Court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having willfully abandoned him;” (and at p. 584),

“The Court in Wisconsin was asked to prevent that decree from being defeated by fraud.”

Of course, the Wisconsin divorce action was clearly a fraud upon both the Wisconsin Court and on Mrs. Barber.

If this Court when it decided the *Barber* case in 1859 thought it was applying the New York law as to the effect of a divorce decree upon the alimony provisions of a prior separation decree, it neither said so nor cited any New York cases. If the New York Court of Appeals assumed that this Court was so applying New York law, it also cited no New York cases in support of that assumption.

Until the decision of this Court in *Williams v. North Carolina*, 317 U. S. 287, divorces like that obtained by Mr. Barber in Wisconsin were held null and void in New York State and in other states.

Only this Court can clarify the situation arising out of the old *Barber* decision and the more recent *Williams* and *Esenwein* decisions, in view of the reliance made by the Court of Appeals upon the *Barber* case in its opinion in the instant case.

2.

The respondent repeatedly refers to the stipulations (Plaintiff's Exhibit B, B1), (R. 23, 29) as an agreement for the payment of alimony. The instruments state them to be stipulations and the provisions thereof to be "subject to the approval of the Court" (R. 24, 25).

The opinion of the Court of Appeals, in referring to the amount of the suggested payments, describe it as "an amount that had been recommended in a stipulation filed with the Court". The Special Term was not bound to accept the recommended amount and to include same in the decree. It could, in its discretion, fix either a greater, lesser or no amount at all. Until Mr. Estin had obtained his divorce, the Special Term of the New York Supreme Court had full power to modify the alimony provisions of the decree by increasing, reducing or eliminating the same entirely.

No enforceable right vested in the plaintiff by virtue of this stipulation, as same, in no sense did constitute a contract between the parties. By its terms, the stipu-

lation left to the Court's discretion to determine the amount, if any, to be paid. It was in fact, as the Court of Appeals stated, merely a recommended amount to be awarded if the court approved.

The cases cited on page 22 are not in point. In these cases, to wit:

Schneitzer v. Buerger,
Hamlin v. Hamlin,
Braunsworth v. Braunsworth,
Goldman v. Goldman,

there were pre-existing and enforceable agreements made between the parties independently of and apart from the separation action. These agreements were such that they might have been enforced in accordance with their terms independently of any separation action or decree therein. Such was not the fact in the present case.

The respondent's contention that she was entitled to collect her alimony from the petitioner as a contract right based upon this stipulation is without merit.

3.

In respondent's "Argument" on page 3, counsel says that this Court has many times answered in the negative the first question quoted thereon.

Counsel is obviously in error in this statement. Not only do the cases cited on page 4 consider facts entirely different from those in the case at bar, but this Court in *Esenwein v. Commonwealth of Pennsylvania*, 325 U. S. 279, has held to the contrary.

There is a vast difference between rights flowing from contracts, deeds, etc., and rights which are merely an incident to a marital relationship, and which cannot arise or exist except through that relationship in the absence of special statutes (see cases cited on p. 8 of our main brief).

Respondent's entire argument on pages 4, 5, and 6 merely emphasizes that there is a real question here presented requiring consideration by this Court.

On pages 12 and 13 respondent cites cases to the effect that in New York the law respecting Divorce and Separation are statutory. *Romaine* and *Eckenbrach* cases cited by us on page 6 of our brief are the leading cases.

Respondent on her brief cites numerous cases which it is stated cite and follow the decision of this Court in the old *Barber* case.

Many of the cases cited by respondent as approving or following the *Barber* case are entirely out of order. Some we have considered. The others either consider facts wholly dissimilar to those in the instant case or do not purport to cite or follow the *Barber* case.

Harding v. Harding, 198 U. S. 317, at 339, discussed the *Barber* case, and said "it (in the *Barber* case) was considered that the judgment in New York, legalizing the separation precluded the possibility that the same separation could constitute willful desertion of the wife by the husband". In support of this statement this Court used the quotation from the *Barber* case as printed on page 2 of this brief.

Of the remainder of the cases said by respondent to cite and follow the *Barber* case, none present facts in any way similar to the facts in the instant case, and in several the *Barber* case is not even mentioned.

Lynde v. Lynde, 181 U. S. 186, considered a judgment granted by a New York Court for arrears of alimony due under a New Jersey divorce decree. No other divorce was involved. Typical of the respondent's mistakes in analyzing cases is the citation of *Durlacher v. Durlacher*, 123 Fed. 2d 70, and *Bassett v. Bassett*, 141 Fed. 2d 954, on pages 8 and 9, as authorities sustaining the decisions of the New York Courts in the case at bar. They relate to matters of practice only so far as they are here applicable. Any error of the New York Courts in granting

the money judgments for arrears of alimony could be considered only by an appeal to and through the New York Courts and to this Court. In each case the ex-wife obtained a money judgment in New York for arrears of alimony under a New York separation decree as did Mrs. Estin here. Instead of pursuing an appeal through the New York Courts as we did in the instant case, and then to this Court, both Mr. Durlacher and Mr. Bassett who had obtained divorces in Nevada sat still until suits were begun in the United States District Court in Nevada upon the money judgments obtained in New York. Those courts correctly held that, as the New York Courts had jurisdiction to grant the judgments, the U. S. Courts were obliged to enforce them. The Circuit Court of Appeals in the *Bassett* case pointed out that the fatal defect of that defendant was in not pursuing the practice that we have followed here (p. 955, quoted by respondent on page 11).

On page 15 respondent cites *Waddey v. Waddey*, 290 N. Y. 251 (there incorrectly cited) as later authority than *Karlin v. Karlin*, 280 N. Y. 32, cited on page 7 of our brief. The *Waddey* case simply held that the legislature was without power to authorize the Courts to amend the alimony provisions of a decree in existence when the amendment to the statute was enacted. We have no similar situation here.

In the recent case of *Security Trust Co. of Rochester v. Woodward*, cited on page 18, it is evident that the Circuit Court of Appeals felt obliged to follow the decision of the New York Court of Appeals in this case. Presumably an application to this Court for a Writ of Certiorari has or will be made in that case.

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, has no facts in common with the instant case.

On page 18 respondent cites cases from nine states as authorities supporting the decision of the New York Court of Appeals in the instant case.

Our examination of these cases is interesting. Only two or three consider facts at all similar to the one at bar and they were decided before this Court decided the *Esenwein* case or did not cite it.

Price v. Ruggles, 247 Wis. 187 (1943) discussed rights of two women to dower rights, one of whom had been divorced.

Simonton v. Simonton, 40 Idaho 751 (1925) in a 3 to 2 decision held that the support provisions of a separation decree remained in full force until a motion has been made to modify the decree based upon a subsequent divorce obtained by the husband out of the state upon constructive service. Two justices dissented upon the ground that the divorce was an absolute bar to a claim for support under the pre-existing separation decree.

Van Inwagen v. Van Inwagen, 86 Mich. 33 (1921) considered a divorce in another state obtained against a Michigan resident, and a Michigan Statute which permitted the resident of that state to sue for a divorce upon that ground.

Bennett v. Bennett, 63 N. J. Eq. 306;

Bolton v. Bolton, 86 N. J. L. 622;

Arrington v. Arrington, 127 N. C. 190, and

Rogers v. Rogers, 46 Ind. App. 509

were cases where suit had been brought for alimony awarded by decrees in other states.

Chappell v. Chappell, 86 Md. 532, considered solely several orders made in that case and no divorce decree of another state was involved.

State cases to the contrary and upholding our position, in addition to the Pennsylvania Supreme Court decision in the *Esenwein* case, include *Harrison v. Harrison*, 20 Ala. 679, and *McCullough v. McCullough*, 203 Mich. 288.

The views there expressed on the question of law presented by this application for a writ are not without support from some of our New York Supreme Court Justices.

In *Kreiger v. Kreiger*, 271 N. Y. App. Div. 872 (1st Dept.) a case similar in facts to the one at bar, two of the Justices voted to reverse a money judgment for arrears of alimony claimed to be due the plaintiff. Mr. Justice Callahan said:

“If the Nevada divorce was valid it terminated the marital relation and the wife’s rights under the separation decree (citing cases).”

Respondent, on page 23 of her brief, takes issue with the petitioner’s statement in his brief (p. 6) that the only statutory provisions in New York providing for support for an ex-wife are contained in Section 1155 of the Civil Practice Act and Section 7, ~~PAR.~~ 5 of the Domestic Relations Law. Respondent is correct in her statement that there is an additional statutory provision, Section 1140 A of the Civil Practice Act, which, however, relates solely to cases of annulment of a void or voidable marriage. With that correction, our statement in Paragraph 4 (not 5 as respondent says) on page 6 of our brief is an accurate statement of the New York law, and respondent’s comment respecting Sections 1161-1164 is incorrect. Those sections refer to decrees in separation actions, and not to divorce actions.

IN CONCLUSION.

Writ of Certiorari Prayed for Should Be Granted.

Respectfully submitted,

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.





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IN THE
Supreme Court of the United States

October Term, 1947.

No. 139.

JOSEPH ESTIN,

Petitioner,

AGAINST

GERTRUDE ESTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

✓ JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1947.

JOSEPH ESTIN,
Petitioner,

AGAINST

GERTRUDE ESTIN,
Respondent.

No. 139.

**On Writ of Certiorari to the Court of Appeals of
the State of New York.**

Opinions Below.

The opinion of the New York Court of Appeals is reported in 296 N. Y. 308. It is printed at R. 97-101.

No opinion was written by the Appellate Division of the Supreme Court.

The opinion of the New York Supreme Court (Mr. Justice Hallinan) is not reported officially. It is reported in 63 N. Y. Sup. 2d 476, and is printed at R. 81-92.

The Constitution of the United States Is Involved.

The ground on which the jurisdiction of this Court is invoked is the failure of the New York Court of Appeals to give the full faith and credit required by Article IV, Section 1, of the United States Constitution, to the divorce

decree obtained by the petitioner against the respondent in Nevada by refusing to hold that the obligation of petitioner to comply with the support provision of a separation decree obtained by the respondent in the State of New York was terminated by the valid divorce decree subsequently obtained by him in Nevada.

Jurisdiction.

The petitioner's petition for a Writ of Certiorari to the New York Court of Appeals was denied by this Court on October 13, 1947. On a petition for a rehearing, the order of October 13, 1947, was vacated, and the Writ of Certiorari was granted and this action consolidated with *Kreiger v. Kreiger*, October Term, 1947, No. 371, by order made December 15, 1947 (R. 104). The remittitur of the New York Court of Appeals is dated April 18, 1947 (R. 96) and jurisdiction was invoked under Section 237(B) of the Judicial Code as amended February 13, 1925.

Statement.

The facts material to the consideration of the question presented are:

In October 1943, a decree for the plaintiff was made in this separation action by the Supreme Court of the State of New York, and in it awarded the respondent \$180 per month for her maintenance and support (R. 12).

Mr. Estin moved to Nevada in January 1944 (R. 25). He has ever since resided and voted there (R. 25, 56), maintained his bank account there (R. 25), filed his income tax returns from there (R. 25, 52-55), paid poll taxes (R. 25, 55, 56) and personal property taxes there (R. 26, 56, 57). His automobile licenses were issued to him as a resident of Washoe County (R. 26, 58).

On May 24, 1945, the petitioner obtained a decree of divorce in the Second Judicial District Court of the State

of Nevada in and for the County of Washoe, upon the ground of three years continuous separation without cohabitation (R. 40), after that Court had been advised of the New York decree (R. 48).

Mrs. Estin was served with a copy of the summons and certified copy of the complaint in New York City but did not appear in the action and defaulted (R. 43).

The petitioner ceased paying the said alimony on May 24, 1945 (R. 8, 9), and the respondent in 1946 moved for a money judgment for the amount of the arrears (R. 7, 8). This motion was opposed by the petitioner, based upon his divorce decree in Nevada, supplemented by further proof of his domicile there (R. 30 to 52, 24, 27, 28, 29).

Upon similar papers, the petitioner moved to modify the judgment in the New York separation action by striking out the provision thereof for the payment of money by the petitioner to the respondent for her support and maintenance (R. 67, 68). The New York Supreme Court, Queens County, in an opinion (R. 81 to 91 inc.) granted the respondent's motion and denied the petitioner's motion.

The order and judgment (R. 4 to 7) were affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by order dated November 12, 1946 (R. 92), and judgment was entered thereon dated November 20, 1946 (R. 93). On appeal to the New York Court of Appeals the judgment was affirmed by Remittitur dated April 18, 1947 (R. 96), upon an opinion by Chief Judge Loughran (R. 97 to 101 inc.). A Writ of Certiorari to the Court of Appeals was granted by this Court on the 15th day of December, 1947.

The parties had no children (R. 48).

Summary of Argument.

1. The petitioner became a resident of Nevada before instituting the divorce action in that State, exercised and enjoyed all the rights and privileges of citizens domiciled in that State, such as voting, paying taxes, owning and maintaining his home there, where he still resides.

2. The divorce decree obtained by the petitioner in the Nevada Court was recognized as valid by the New York Court and terminated the status of petitioner as husband and wife.

3. The alimony provisions of the prior separation decree obtained in the New York Supreme Court by respondent against petitioner was based upon the common law obligation of a husband to support his wife during the time they are husband and wife, and created for the respondent no new rights and imposed upon the petitioner no new obligations.

4. In New York State the alimony provision of a separation decree is a procedural remedy provided by statute ancillary thereto and depending for validity thereon, designed to make more easy the enforcement of the husband's common law duty to support his wife while she remains his wife by measuring that duty in terms of dollars. In New York alimony may not be awarded a wife in such an action unless she wins a separation.

5. The respondent had no vested interest in the support provision of her New York separation decree; the New York Courts had power to modify that provision both as to future and past-due alimony.

6. No common law power exists in the New York Courts to compel a man to support his ex-wife and there is no such obligation created by statute applicable here.

7. The Nevada divorce decree, by ending the marriage between the petitioner and respondent, terminated the former's obligation to make the required alimony payments to the latter; that obligation, measuring his common law duty to support his wife, ended when the respondent ceased to be his wife, and was not continued or re-created by statute.

8. The case of *Barber v. Barber*, 21 How. 582, relied on by the New York Court of Appeals in *Estin v. Estin*, and the cases of *Bassett v. Bassett* and *Durlacher v. Durlacher*, relied upon by the New York Supreme Court in that case, are not authorities supporting the judgment of the New York Court of Appeals here under review.

POINT I.

The petitioner obtained a bona fide domicile in Nevada before the commencement of his divorce action and continued to maintain it.

The facts recited in Mr. Estin's affidavit submitted in opposition to the respondent's motion for a money judgment and in support of his motion to strike the alimony provision from the New York decree clearly and without suspicion established that the petitioner had become domiciled in Nevada in January 1944 (R. 25) over fifteen months before filing his divorce action (R. 33).

He has ever since exercised all the rights and privileges of a Nevada resident, registering, voting, paying taxes, etc. (R. 25, 26, 52 to 58).

He was acknowledged to be a Nevada resident by the New York Supreme Court (R. 86).

POINT II.

Petitioner's divorce decree granted by the Nevada court is valid, was recognized as such by the New York courts, and terminated the status of petitioner and respondent as husband and wife.

This cause comes here with the full recognition by the New York Courts of the validity of petitioner's divorce decree made in Nevada.

The uncontroverted facts contained in Mr. Estin's affidavit (R. 5, 6, 7) are complete proof that Mr. Estin was and is *bona fide* domiciled in Nevada and that the Nevada Court thereby obtained full jurisdiction to make the divorce decree.

Upon these facts as to domicile, the New York Court of Appeals said in this case (296 N. Y. 308):

"We have then this situation: The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage; and the only remaining question is whether the Nevada decree must also be taken to have cancelled the alimony provision made for the wife through the prior judgment in this New York separation action" (R. 99).

POINT III.

The alimony provision of the separation decree here

- (a) Was based upon the common law obligation of a husband to support his wife during the time that they are husband and wife; and
- (b) Created for the wife no new rights and imposed upon the husband no additional obligations.

By making clear the legal background of the alimony provisions of separation decrees, their purpose and their limitations, we believe that the principles of law applicable to this case, as are hereinafter presented, will be more clearly apparent.

This point will be considered under the above subdivisions.

(a) *The alimony provision of this separation decree is based upon a continuance of the status of husband and wife and the common law liability of the petitioner to support the respondent while she remains his wife.*

The English Courts have recognized this statement of the law for many years.

In *Harris v. Morris* (1801), 4 Espinasse's Reports 41, we read:

"the law has said that where a man turns his wife out of doors, he sends her with credit for her reasonable expenses."

The Probate, Divorce and Admiralty division, in *Dean v. Dean*, 129 Law Times Reports by Sir Henry Duke, P., cited that case and said (p. 705):

"The wife's right to maintenance is not dependent on ecclesiastical law or or the Matrimonial

Causes Act 1857, but is rooted in the Common Law. She is entitled to pledge her husband's credit for necessities, *i. e.*, for maintenance suitable to her station in life, which is that of her husband. I refer to cases such as *Harris v. Morris* (1801, 4 Esp. 41) and *Wilson v. Glossep* (58 L. T. Rep. 707; 20 Q. B. Div. 345). That is the Common Law. A deserted wife left without means suitable to her position has a right, and is of necessity authorized, as her husband's agent, to pledge his credit for the purpose of providing herself with maintenance according to her husband's station. This wife was and remains deserted. The effect of the decree of Judicial separation is to substitute a fixed income for that mode of maintenance by pledging her husband's credit for necessities according to his position, which the Common Law gave her."

In *Forth v. Forth* (1867) 16 Law Times Reports 574, Wilde, J. O. said:

"I have already pointed out in *Prichard v. Prichard* (*ubi sup.*) that in my opinion, although the Court by a decree of Judicial separation gives a legal warranty to a wife and husband to live apart, still they remain husband and wife, and that while they remain so, the obligation also remains on the husband of contributing to the support of the wife."

The New York Court of Appeals adopted this view in *Romaine v. Chauncey*, 129 N. Y. 566 at 569, when Judge Andrew said in discussing the purpose of alimony:

"Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object."

In *Faversham v. Faversham*, 161 N. Y. App. Div. 521 at 524, the opinion says:

"The right to receive alimony, as it is understood in this State, is clearly a personal right, arising out of the domestic relations * * *."

While the *Faversham* case considered alimony awarded by a divorce decree, it recognized that this was simply a re-creation upon divorce of the husband's prior common law duty to support the wife.

This same principle has been enunciated by this Court in many cases. We will cite and quote from two.

In *Audobon v. Shufelt*, 181 U. S. 575, at 577, this Court said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the Court of appropriate jurisdiction."

In *Wetmore v. Markoe*, 196 U. S. 68, this Court said at page 74:

"We think the reasoning of the *Audobon* case recognized the doctrine that a decree awarding alimony to the wife or children or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children."

and at page 77 further said:

"While it is true in this case the obligation has become fixed by an unalterable decree, so far as the

amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father."

(b) *The alimony provision creates for the wife no additional rights and imposes upon the husband no additional obligations.*

In *Faversham v. Faversham*, 161 N. Y. App. Div. 521 (*supra*), at 523, the Court also said:

"A decree for alimony therefore does not create but rather defines and makes specific the husband's original obligation * * * it measures and makes specific and certain his obligation, but it does not change the character of that obligation which is purely personal and solely for the support of the wife."

and see:

Wetmore v. Markoe (supra);

Audobon v. Shufelt (supra);

Romaine v. Chauncey (supra).

These cases make clear that the allowance of alimony in a separation decree creates no additional rights for the wife and imposes no additional duty upon the husband. The Court measures the existing duty of the husband to support his wife so long as they remain husband and wife in terms of dollars, thus making it easier for the wife to compel the husband to fulfill his duty to support her imposed upon him by law. It makes a simplified method of procedure to enforce that right.

The *Faversham* case considered alimony awarded by a divorce decree, but the underlying principle is the same, a man's duty to support his wife, a duty which ended with a divorce but which in New York is continued by a statutory creation of the same duty where the wife obtains a divorce. As noted later on this brief, there is no duty upon a husband to support his ex-wife in New York except in three cases (p. 24), all non-existent here.

At common law the termination of the status of husband and wife ended the duty of the husband to support his wife, and the above authorities make clear that the alimony provisions of a separation decree do not extend beyond that limitation.

POINT IV.

The inclusion of the alimony provision in the decree here is a procedural remedy provided by statute ancillary thereto and depending for validity thereon, designed to make more easy the enforcement of the husband's common law duty to support his wife while she remains his wife.

In New York State an award of alimony pursuant to Section 1170 of the Civil Practice Act (printed at page 14 of this brief) is incidental only to a decree of divorce or separation granted to the wife. If she does not win a decree, she may not in that action have a decree or judgment for support only.

Johnson v. Johnson, 206 N. Y. 561;

Ainsworth v. Ainsworth, 239 N. Y. App. Div. 258;

Erkenbrach v. Erkenbrach, 96 N. Y. 456, 461, 465.

We have quoted *Romaine v. Chauncey*, 129 N. Y. 566 (*supra*), at 569, on page 8 of this brief, and at page 570 the opinion continues:

"and when awarded, it (the alimony award) is not so much in the nature of a payment of a debt as in that of the performance of a duty."

This Court, in *Wetmore v. Markoe* (*supra*) 196 U. S. 68, at 77, said such a provision is

"only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them against the husband and father."

This right was the wife's ancient common law right to support, and if necessary, to use the husband's credit for the purchase of necessities, no less and no more.

In

Magner v. Magner, 144 N. Y. Misc. 740, at 742,
259 N. Y. Sup. 919, at 921,

the Court, in referring to a separation action, said:

"The right to apply for alimony in such an action is a privilege incidental thereto, It is not obligatory on the wife to make such an application, and, unless she does so, that issue is not before the Supreme Court."

And see:

Varney v. Varney, 178 N. Y. Misc. 165; 34 N. Y. Sup. 2d 155.

POINT V.

The respondent had no vested interest in the support provisions of the New York separation decree, ancillary thereto. The New York Supreme Court had power to modify that provision as to both future and past due alimony. The New York Court of Appeals misconstrued its own decisions in holding to the contrary in this case (296 N. Y. 308).

Chief Judge Loughran of the New York Court of Appeals in his opinion in this case said (p. 314):

“In *Livingston v. Livingston*, 173 N. Y. 377, we held that alimony unconditionally and finally owing to a wife under a matrimonial decree is a vested property right of which she may not be deprived even by way of an act of the legislature.”

We believe that this quotation was written by the learned Chief Judge inadvertently, because later cases cited by that Court clearly recognize that such is not now the law controlling alimony provisions in either divorce or separation decrees under the present New York statutes.

When the decree of absolute divorce was made in *Livingston v. Livingston* (*supra*) in 1892, the New York statutes gave no power to any Court to modify the support provisions it contained. In 1900, Section 1759, subd. 2, of the Code of Civil Procedure of New York was amended so as to permit a Court to amend such provisions “at any time after final judgment, whether heretofore or hereafter rendered.”

The judgment of divorce in the *Livingston* case was one “heretofore” made, and the majority of the Court of Appeals was careful to limit their consideration of the case to that point.

The Court then held that as there had existed no power to alter the support provisions of the decree when it was made, the legislature was without power under the New York Constitution to later grant that power to any Court.

Nevertheless three judges dissented in an interesting opinion by Judge O'Brien (p. 384, etc.).

In this case the respondent's decree was made under a statute which reserved to the Court full power to modify either future or past due installments of alimony, to wit, Section 1170 of the New York Civil Practice Act, which reads as follows:

"Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders."

Those provisions have been held valid in

Karlin v. Karlin, 280 N. Y. 32, 36,

and in

Fox v. Fox, 263 N. Y. 68, 70.

Livingston v. Livingston (*supra*) was said in the *Karlin* case to be no longer an authority, it having concern with a judgment entered before the above mentioned amendments.

Referring to the said section, Judge Loughran (who wrote the opinion in *Estin v. Estin*, *supra*) in *Karlin v. Karlin* (*supra*) quoted from *Fox v. Fox* (*supra*) as follows:

“The effect of the statute is to write a reservation into every final judgment of divorce.”

In the *Karlin* case, the defendant husband successfully obtained a reduction in the amount of alimony granted by the wife's divorce decree.

That reserved power extends to past due alimony as well as to the future.

In *VanDusen v. VanDusen*, 258 N. Y. App. Div. 1020; 17 N. Y. Sup. 2d 96, the Court in a *per curiam* opinion said:

“The Court had authority under Section 1170, Civil Practice Act, to so modify the final judgment as to alimony past due or thereafter to become due.”

This decision was followed in *Eisinger v. Eisinger*, 261 N. Y. App. Div. 1031, 26 N. Y. Sup. 2d 22, where arrears of alimony in the sum of \$125 was reduced to \$50, and future alimony was reduced from \$20 to \$15 per month.

This Court in *Wetmore v. Markoe*, 196 U. S. 68, at 75, cited *Livingston v. Livingston* and another case and said:

"These cases do not modify the grounds upon which alimony is awarded and recognize that an alimony decree is a provision for the support of the wife settled and determined by the judgment of the court."

In *Wilson v. Hinman*, 182 N. Y. 408, at 410, Judge Cullen said:

"Of course, alimony awarded on the dissolution of a marriage differs in one element from that on a separation; in the latter case the decree merely defines the continuous duty still existing on the part of the husband to support the wife, while in the former the marital obligation is terminated, and the sole liability of the husband towards the wife springs from the decree."

Referring to *Livingston v. Livingston*, 173 N. Y. 377, Judge Cullen said at page 411:

"We have held that, where a divorce contained no reservation of the right to modify the award of alimony, the Court was without power to make such modification and that the legislature could not confer that power in the case of decrees entered prior to the enactment of the statute. We there held that the right of the plaintiff was a property right of which she could not be deprived. Those decisions, however, did not proceed on any theory that alimony was merely a debt; they recognized that the foundation for an award of alimony rested in the marital obligation of the husband's support, but

held that the obligation theretofore indefinite, having been liquidated by the divorce decree at a specific sum, the adjudication was final."

The New York statute as construed by the New York State Courts therefore empowers the Court to modify and reduce both past due and future alimony under a separation decree of that state.

It is obvious that under the New York statutes as they now exist, that there is no vested right in a wife either as to past due alimony or as to future alimony. This Court in *Sistare v. Sistare*, 218 U. S. 1, 28 L. R. A. new Series 1068, stated that as a general rule past due alimony accruing under a decree granting future alimony, become a vested right as to those arrears. The Court also said (p. 17):

"this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested rights attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due."

While the *Sistare* case recognized that in 1904 there was no such discretionary power reserved in the New York Courts, the statute has since been changed as above noted, and the New York cases above cited clearly recognize the changed situation.

The language used by Chief Judge Loughran in this case, quoted on page 13 of this brief, is unsupported by statute, is contrary to the decisions of that Court, to

his own opinion in *Karlin v. Karlin* (*supra*), to the decisions of the New York Appellate Division, and to the decisions of this Court.

As the New York statute now exists, no court of another state nor of the United States has power to entertain an action based upon past due alimony.

McGregor v. McGregor, 52 Colo. 292;

Lockman v. Lockman, 220 N. C. 95;

Bentley v. Calabrese, 155 N. Y. Misc. 843.

The New York Court of Appeals recognized and applied that principle in *Lynde v. Lynde*, 162 N. Y. 425, affirmed in this Court in 181 U. S. 186.

The "Vested Interest" Doctrine.

We wish to emphasize that the doctrine of a "vested interest" in the support provisions of separation decrees and that service of process upon the wife within the jurisdiction of the foreign court, or that she subject herself thereto, is a necessary prerequisite to the termination of her rights thereunder when a later judgment of divorce is obtained against her in that foreign state, has arisen in the courts of New York State only since the first decision by this court in *Williams v. North Carolina*, 317 U. S. 287. As was said in *Russo v. Russo*, 62 N. Y. Sup. 2d 514 (not reported officially) at page 521:

"That *Williams v. North Carolina* (No. 1) has devastated our public policy is obvious. Nevertheless we must survey the areas of possible salvage."

We have not overlooked the concurring opinions of Justice Douglas and Justice Rutledge in the *Esenwein* case. It is obvious that the New York Supreme Court in

this case took their view and endeavored to adopt it as applicable and that the New York Court of Appeals, although not citing their opinion, did the same.

We wish to emphasize that Mr. Justice Douglas in his "concurring" opinion in that case, did not discuss or refer to the historical and legal background or status of alimony provisions in separation decrees in New York. Had the principle underlying such awards and recognized by the New York Courts and by this Court been called to his attention, to wit,—that such provisions are based upon the continuance of the marriage relation, that such awards create no additional rights for the wife, that they are a procedural means for enforcing the husband's common law duty to support his wife, and that there is neither a common law power nor a New York Statute to continue such support when the marriage shall have terminated, we feel confident that their opinions would have been different.

The principle of law involved is much larger and of more importance than the litigation between Mr. and Mrs. Kreiger and between Mr. and Mrs. Estin. It affects the nation.

The New York Court of Appeals has refused to follow the decision in *Williams v. North Carolina* (*supra*) to its logical conclusion. Let us follow the decision of the New York Court of Appeals to its logical conclusion.

Mr. A. and his wife, residents of New York, are parties to a separation action in which Mrs. A. obtains a decree of separation in that state, with alimony, by reason of desertion. Mr. A. later goes to a distant state, *e. g.*, Arizona, of which he becomes a resident. Later he obtains information that grounds exist whereby he can obtain a divorce from his wife for adultery. He brings such an action in Arizona where he is domiciled. Mrs. A. is served with process in New York and defaults in appearing or pleading, and Mr. A. obtains his divorce upon

the ground stated. He ceases payment of alimony under the separation decree, and Mrs. A. makes her motion for a money judgment for the arrears which have accrued since Mr. A. obtained his divorce. Mr. A. opposes, relying on his Arizona divorce decree. The decision of the New York Court of Appeals in *Estin v. Estin* steps in and says to Mr. A., Mrs. A.'s right to alimony under her prior separation decree is not ended by your divorce for her adultery, as the Arizona Court never had jurisdiction over her person; hence, you must continue the alimony payments. §1172 C, New York Civil Practice Act, authorizes a modification of the alimony provisions of a divorce decree only for such conduct and then only if the wife is living openly with another man as his wife although not married to him. Occasional adultery is not enough.

And see:

Waddey v. Waddey, 168 N. Y. Misc. 904.

There is no half-way station.

In *Russo v. Russo* (*supra*), 62 N. Y. Sup. 2d 514 at 523 the Court said:

"That a decree of divorce must be given acceptance for one purpose and denied acceptance for another, does not appeal to an orderly mind."

That comment is particularly true where the New York Courts hold that an alimony provision is valid only when made a part of the separation decree, but in the instant case hold that the termination of the subject matter of that decree, to wit, the marriage relation of the parties, leave in full force that alimony provision.

In *Herrick v. Herrick*, 55 Nevada 59, it was contended by Mrs. Herrick:

"The Nevada five-year statute as applied by the lower Court would operate as an impairment of the obligation of contracts and deprive the wife of a vested right under the California decree.

Appellant's contention that the decree of divorce in this case impairs the obligation of contract evidenced by the California decree of separate maintenance, is devoid of merit. The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance."

A divorce decree is obviously just as effective if lawfully based on separation without cohabitation as if based on adultery. If it is not, where is the line of difference to be drawn and by whom?

POINT VI.

No common law power exists in the New York courts to compel a man to support his ex-wife, and there is no such obligation created by statute applicable here.

Mr. Justice Hallinan says in his opinion in this case, 63 N. Y. Sup. 2d 476, unreported officially:

"The State of New York had and continues to have an interest in the abandoned wife in whose favor its Courts have rendered judgment, who continues to reside within its borders, and who may become a public charge should the defendant be freed of his obligation to support her. Under these circumstances, this Court is not powerless and refuses to strike from its decree the provisions for the support of the plaintiff" (p. 484) (R. 89).

It seems clear that the learned Justice mistakenly assumed that the New York Courts have a common law power to direct a husband to continue to support a wife from whom he has been divorced.

In 17 Am. Jur., Divorce & Separation, §513, page 418, it is said:

"In the case of an absolute divorce terminating the matrimonial ties, the duty of support no longer exists at common law, and in the absence of a statute continuing the obligation of maintenance beyond the dissolution of the marriage, it is difficult to find a basis for awarding permanent alimony."

The decision of the New York Court of Appeals in *Livingston v. Livingston*, 173 N. Y. 377, recognized this to be the law. The Court there did not deal with the alimony provisions of a separation decree, but with the alimony provisions of a divorce decree.

Judge Gray had this distinction in mind when he said (p. 381):

"The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon, or spring out of, the marriage relation. * * * The judgment defined and created a new obligation on his part * * *."

This basic difference in the principles underlying these two different types of cases was clearly emphasized in *Walker v. Walker*, 21 N. Y. App. Div. 226, where the Court said:

"the plaintiff, prior to the decree, had a right of support; by her divorce, she lost that right and, in substitution for it, acquired a new right, a judg-

ment requiring the payment to her of a specific sum of money."

The New York Court of Appeals in *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, sets forth the history of the various legislative acts by which the power to award permanent alimony was conferred on our Courts, and notes that this power was first conferred in 1813.

In *Romaine v. Chauncey*, 129 N. Y. 566, at 571, the Court said, referring to alimony awarded by a divorce decree:

"There is no doubt, of course, that the wife's right to alimony comes from statute and not from common law."

We have shown on the preceding Points that the respondent had no "vested interest" in the support provisions of her separation decree.

We have shown on Point IV that the alimony provision of a separation decree is designed to enforce the common law duty of the husband to support his wife and is based on the continuance of that obligation.

If, therefore, any power exists in our New York Courts to continue the alimony provision of the plaintiff's separation decree after her marriage with the defendant was dissolved by the Nevada Court, that power must be found in the statutes of this state.

We have searched carefully and can find no provision in the New York Statutes for the support of an ex-wife after a dissolution of the marriage, except in Section 1155 of the Civil Practice Act, when a divorce is granted to the wife, in Section 1140-a, when an annulment is granted a wife, and in Section 7.5 of the Domestic Relations Law, when a marriage is annulled on the ground that the wife has been incurably insane for a period of five years or more. Not one of those provisions is applicable here.

POINT VII.

The Nevada decree divorcing the petitioner terminated the obligation of the petitioner to pay for the support and maintenance of the respondent under her pre-existing separation decree granted by the New York Supreme Court, an obligation based upon his common law duty to support his wife.

The New York Court of Appeals in this case, 296 N. Y. 308, at 312, held:

“The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage” (R. 99).

The Court then by-passed the majority opinion of this Court in *Esenwein v. Commonwealth of Pennsylvania*, 325 U. S. 279. This case is very interesting in that, although the Court was unanimous in affirming judgment of the Pennsylvania Supreme Court, three of the Justices dissented from the majority as to the reason for the affirmance as well as from the reasons stated by the Supreme Court of Pennsylvania in that case (348 p. 455).

The prevailing opinion was written by Mr. Justice Frankfurter. The facts recited in that opinion are, briefly, as follows: In 1919, a husband and wife separated, and she obtained “a support order” (the equivalent of our New York separation decree), which was modified from time to time. In 1941, the husband went to Nevada, and obtained an uncontested divorce by default. He later applied to the Pennsylvania courts for total relief from the support order. He was defeated in the Pennsylvania courts and the United States Supreme Court granted certiorari. The prevailing or majority opinion, as written by Justice Frankfurter, then says:

"This case involves the same problem as that which was considered in *Williams v. North Carolina*. . . .

Since, according to Pennsylvania law, a support order does not survive divorce (citing cases) the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case. . . . The Full Faith and Credit Clause placed the Pennsylvania Courts under duty to accord *prima facie* validity to the Nevada decree."

The minority of this Court, in opinion by Justice Douglas, disagreed with this flat statement of the law to be applied to the facts before the Court.

Five Justices joined in the above quoted statement. The three Justices dissenting therefrom united in the minority opinion of Justice Douglas, and this opinion was quoted by Mr. Justice Hallinan of the New York Supreme Court in this case, 63 N. Y. S. 2d 476 at 485, in support of a theory which was not approved by the majority of this Court.

The reason for the affirmance of the Pennsylvania judgment as stated in the majority opinion was that the evidence in the case, like that in the second *Williams v. North Carolina* case, sustained a finding that the husband had not obtained a *bona fide* domicile in Nevada and thus the presumption of validity of the Nevada divorce decree was overcome. Mr. Esenwein's total stay in that state was about three and one-half months.

That the above quotation from the prevailing opinion was not written by Mr. Justice Frankfurter without due regard for the language used, is apparent later in his opinion, where he says:

"The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day."

We believe it clear that the opinion of the majority of this Court is the one which states the rule which (the present case) must control in conformity with the law as fixed in *Williams v. North Carolina* (*supra*).

Chief Judge Loughran in his opinion in the *Estin* case, after disposing of the *Esenwein* case, said the decision of this Court in *Barber v. Barber*, 21 How. 582, to be "an authority much in point."

In several material respects the facts in that case essentially differ from those in the present case.

Mrs. Barber had obtained a separation decree with alimony in New York in the year 1846. At that time the law in New York was as recited in *Livingston v. Livingston*, 173 N. Y. 377 (*supra*), and no court had any power to modify the support provision of her decree. So it may have been argued that Mrs. Barber had a vested property right (improperly, we believe) and that was the reason for the language used in the quotation made by Judge Loughran at page 314 (296 N. Y.) of his opinion.

It also appears from the opinion in the *Barber* case that Mr. Barber had brought his divorce action in Wisconsin upon the grounds upon which he had been defeated in the New York separation action, but had concealed that fact from the Wisconsin Court. It was undoubtedly by reason of this concealment that the Court said at page 584:

"Our first remark is—and we wish it to be remembered—that this is not a suit asking the Court for the allowance of alimony. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud."

It is clear that the purpose of the Court as expressed throughout the opinion was to defeat this fraud. Manifestly it was to especially emphasize this fact that the Court said "and we wish it to be remembered".

It is interesting to note that no authority was cited in *Barber v. Barber* to support the statement in the opinion which was quoted by Judge Loughran in *Estin v. Estin*. Also, that the lengthy opinion was devoted almost exclusively to the practice invoked by Mrs. Barber to overcome the effect of that fraud.

If this Court when it decided the *Barber* case in 1859 thought it was applying the New York law as to the effect of a divorce decree upon the alimony provisions of a prior separation decree, it neither said so nor cited any New York cases. If the New York Court of Appeals assumed that this Court was so applying New York law, it also cited no New York cases in support of that assumption.

We believe that *Barber v. Barber* is not an authority for the judgment of the New York Court of Appeals in *Estin v. Estin*, and hence not an authority supporting the judgment in the case now under consideration.

It is a well established and long recognized rule in New York State that a valid divorce decree ends the liability of a husband to pay the wife alimony under a prior separation decree. This is upon the ground that by the divorce the marriage between the parties was dissolved and that alimony is dependent upon the continued existence of the marriage relation, and the husband's common law duty to support his wife.

This rule was said to be applicable here by the two dissenting Justices of the Appellate Division of the New York Supreme Court (R. 62).

In *Solotoff v. Solotoff*, 51 N. Y. Supp. 2d 514, Mr. Justice Daly considered the effect of an Ohio divorce upon a judgment for alimony occurring prior to the entry of the divorce decree. He held that the plaintiff wife was entitled to a judgment for alimony from the date of the arrears to December 23, 1942, the date her husband obtained the divorce in the Ohio Court. He said:

“The decree of divorce granted to the defendant in the State of Ohio on December 23, 1942, in which action the plaintiff appeared, terminated her rights for alimony *pendente lite* in this state for all periods subsequent to that decree.”

In *Scheinwald v. Scheinwald*, 231 App. Div. 757, 246 N. Y. S. 33 (Second Department), a divorce had been granted a husband in Nevada where the wife appeared and answered. That Court held that the rights of the wife to alimony under a prior separation decree granted in this state ended with the entry of the Nevada decree.

In *Richards v. Richards*, 87 Misc. Reports 134, 149 N. Y. Sup. 1028, Special Term, New York County, had before it a decree in a separation action awarding alimony to a wife, together with a subsequent divorce decree in favor of the husband rendered in Massachusetts. Subsequently a motion was made to punish the defendant husband in this state for contempt for failure to pay the alimony called for by the New York decree. The motion was granted only to the extent that alimony had accrued up to the date of the entry of the divorce action in Massachusetts.

Mr. Justice Donnelly said:

“We therefore have a valid judgment for separation from bed and board rendered in this state, bearing date March 15, 1912, and, for the purposes of this motion, a valid judgment for absolute divorce rendered in the State of Massachusetts, bearing date December 4, 1912. It has been held in this state that a judgment for absolute divorce will supersede a judgment for separation (*Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941; *Burton v. Burton*, 150 App. Div. 791, 135 N. Y. Supp. 248;

Gibson v. Gibson, 81 Misc. Rep. 508, 148 N. Y. Supp. 37), and, as full faith and credit must be given to the Massachusetts judgment in every court within the United States, it follows that it supersedes the judgment for separation obtained in this state."

The only difference between the *Solotoff*, *Scheinwald* and *Richards* cases and the one at bar is that the wife appeared in those cases in the foreign state, while in the present case the wife was not served in Nevada nor did she appear in the action. She was personally served with the summons and complaint in New York.

Under the rule in *Haddock v. Haddock* (*supra*), this made the difference between a valid and an invalid decree, but when *Haddock v. Haddock* was expressly overruled in *Williams v. State of North Carolina*, the state of the residence of Mr. Kreiger, to wit, Nevada, obtained jurisdiction to grant a divorce.

Hence, those decisions above cited are squarely in point, not only that the valid divorce decree supersedes the separation decree, but in fixing the time when alimony under the separation decree ceased, to wit, the date of entry of the divorce decree in Nevada.

A valid default judgment is just as binding to its full extent as the same judgment made after a trial, or after an appearance by the defendant.

In *Tax Lien Co. v. Schultz*, 213 N. Y. 9, at 12, this Court said:

"It is a general rule that a judgment is conclusive between the parties and their privies upon all matters embraced wherein the issues in the action which were or might have been litigated. It is immaterial whether issues are joined by an answer to the complaint or ordered by the plaintiff

and left unanswered. The rule applies as well to a judgment by default when the facts stated warrant the relief sought as to one rendered after a contest."

It necessarily follows that the rights of the parties, as husband and wife and the rights and duties dependent on the continuance of that status, were legally adjudicated as fully and completely in Mr. Kreiger's divorce action in Nevada as though Mrs. Kreiger had appeared therein and defended.

The New York Court of Appeals in this case, attempted to distinguish the case of *Scheinwald v. Scheinwald*, 231 N. Y. App. Div. 757, and *Richards v. Richards*, 87 N. Y. Misc. Rep. 134, from the *Estin* case by saying that in those cases the foreign court had jurisdiction of the persons of both parties, but that Mrs. Estin was never within the jurisdiction of the Nevada Court.

That Court erred, we believe, upon two grounds in so doing.

1st. Those cases and those heretofore cited on this brief fixed the law in New York prior to the decision of this Court in *Williams v. North Carolina*, just as firmly as ~~did~~ the case of *Com. v. Parker*, 59 Pa. Super. Ct. 74, and *Com. v. Kurniker*, 96 Pa. Super. Ct. 553, fixed the law in Pennsylvania as was stated in *Esenwein v. Pennsylvania* (*supra*).

Each of the *Scheinwald*, *Richards* and *Parker* cases considered a foreign divorce in which the defendant was either served with process within the jurisdiction of the foreign state or appeared or answered in the action. In the *Esenwein* case we find that Mrs. Esenwein was not served within the jurisdiction of the Nevada Court, neither did she appear nor answer therein. Hence those basic facts in that case, facts which the New York Court of

Appeals used to distinguish the *Estin* case from the *Scheinwald* and *Richards* cases and by inference from the *Parker* case, are the same as in the *Estin* case and this case.

Mr. Justice Frankfurter in the majority opinion in the *Esenwein* case, said:

"Since, according to Pennsylvania law, a support order does not survive divorce" (citing the above Pennsylvania cases) "the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case."

and later he said:

"The Pennsylvania Supreme Courts rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day."

The *Parker* case fixed the law in Pennsylvania that a valid divorce obtained in a foreign state ended the obligation of a husband to continue support or alimony payments under a prior judgment or decree, irrespective of the service of process within or without the jurisdiction of that state or whether the defendant wife appeared in the action. The same principle requires an adjudication that the *Scheinwald* and *Richards* cases fixed the law in New York as being the same.

The same rule of law is recognized in Nevada in *Herrick v. Herrick*, 55 Nev. 59, 68 2d.

2nd. The alimony award in the separation decree here was simply the petitioner's then common law duty to support Mrs. Kreiger while she remained his wife, measured by the Court in terms of dollars. That provision had of itself no power to perpetuate itself when the status ended upon which it was based and without which it could not exist. The common law obligation of Mr.

Kreiger to support Mrs. Kreiger was an integral part of the marriage status which was before the Nevada Court when he took there the "matrimonial res". The alimony provision of the decree was that duty called by another name, nothing less and nothing more. Manifestly, when the marriage status ended by the divorce that common law obligation translated into the alimony provision of the separation decree and depending for its existence upon an existing marriage, also ended.

The Courts of New York State have striven mightily to hamstring the decision of this Court in *Williams v. North Carolina* (1st).

That decision made meaningless the "public policy" of New York as respects the recognition of divorces obtained in other states.

That "public policy" was based on the principle that, if a husband and wife were domiciled in New York, neither by abandoning the other could take the "matrimonial res" to another state; it remained in New York.

Gibson v. Gibson, 266 App. Div. 975; 44 N. Y. Sup. 2d 372.

In *Ellis v. Martin*, 53 Missouri 575, that Court defined the matrimonial res as

"the status of the plaintiff in relation to the defendant to be acted on by the Court. This relation being before the Court in the person of the plaintiff, the Court acts on it, and dissolves it by a judgment of divorce."

When Mr. Estin, a *bona fide* resident of Nevada, went to the Court in that state and sued for a divorce, the matrimonial res went with him, and the decree of that Court dissolved the status which he and Mrs. Estin theretofore had borne to each other, that of husband and

wife. Had there been no prior separation decree, it is obvious that the divorce decree terminated any duty of Mr. Estin to support Mrs. Estin in the future.

Lambert v. Lambert, 41 N. Y. Sup. 2d 841 (not reported officially).

It is logical that all rights and duties which depend for existence upon the continued status of husband and wife must cease when that status ends.

POINT VIII.

The authorities cited in this case by the New York Court of Appeals and by the New York Supreme Court are not in point and do not support the judgment here under review.

The opinion in the Court of Appeals states that the principle of *res judicata* (p. 313):

"had no application whereas in the present case, the Court which granted the last judgment was without jurisdiction of the person of the defendant *cf. Miller v. Miller*, 200 Iowa 1193; *Wagster v. Wagster*, 193 Arkansas 902; 2 Freeman on Judgments (5th Ed.) §629", (R. 99)

and at page 314 further said:

"in *Jackson v. Jackson* (290 N. Y. 512) we held that a Court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife" (R. 100).

On pages 313 and 314 the Court considered at some length *Barber v. Barber* (21 How. [U. S.] 582) (R. 100).

Although the decisions in *Miller v. Miller* (*supra*) and *Wagster v. Wagster* (*supra*) may indicate that the Courts of Iowa and Arkansas take a similar view of the legal results of a foreign divorce as did the New York Court of Appeals, those views are wholly contrary to the view of the law as expressed by the Supreme Court of Pennsylvania in *Esenwein v. Esenwein*, 348 Pa. 455, by the Supreme Court of Alabama in *Harrison v. Harrison*, 20 Ala. 629, the Supreme Court of Michigan in *McCullough v. McCullough*, 203 Mich. 288, by the Supreme Court of California in *Cardinale v. Cardinale*, 8 Cal. 2d 762; 68 P. 2d 351, 352; and in the recent case of *Rodda v. Rodda*, decided by the Circuit Court of Oregon, County of Multnomah, June 27, 1947 (not yet reported).

In *Jackson v. Jackson* (*supra*) the New York Court of Appeals had before it a wife's right which was founded on a legal contract, and not her common law right to be supported by her husband based upon the status of husband and wife. That Court in *Severence v. Severence*, 260 N. Y. 432 affirmed an order that the alimony provision in a New York divorce decree be stricken out on the ground that the ex-wife had re-married (Section 1159 N. Y. Civil Practice Act) but directed that this was "without prejudice to the right of the plaintiff to seek relief under the provisions of the contract of December 12, 1925" (a separation agreement) thereby reserving the question of such rights to the future. Hence it is obvious that different principles of law control the two cases.

When the New York Supreme Court awarded judgment to Mrs. Estin in this case, Mr. Justice Hallinan (R. 81) cited *Durlacher v. Durlacher*, 123 F. 2d 70 and *Bassett v. Bassett*, 141 F. 2d 954, certiorari denied, 323 U. S. 718 as authorities that the alimony provision of Mrs. Estin's separation decree were not "automatically set aside by such divorce decree" (R. 87).

Those decisions were made while *Haddock v. Haddock*, 201 U. S. 631, was still the rule by which the legality of divorces such as the one here was determined. As the respondent in the New York Courts used these two cases as corner stones in her argument, and will undoubtedly do so here, we will now consider their applicability to the present case.

Durlacher v. Durlacher, 35 Fed. Sup. 1005, considered a case where a husband had obtained a divorce from his wife in Nevada, subsequent to the granting of a decree of separation in New York which awarded the plaintiff wife alimony. When the arrears of alimony accumulated, she made three successive and successful motions for judgments for the amount of arrears to the respective dates of the several motions. The husband appeared specially on the first two motions and objected to the jurisdiction of the Court. He was overruled and judgments were entered for the amount of the arrears, but the defendant took no appeal. He made no appearance in opposition to the application for the third judgment. After these judgments had been entered, the plaintiff brought suit in the United States District Court of the District of Nevada, to obtain a judgment based upon the New York judgments. The District Court granted judgment for the plaintiff as to the first two, but denied her judgment as to the third New York judgment in which the defendant defaulted.

An appeal was taken by the plaintiff to the Circuit Court of Appeals, which is reported in 123 F. 2nd 70. The opinion states that the only question is whether the New York judgments were subject to collateral attack. On page 71, the Court says:

"Simon (the husband) does not rely on the District Court's finding but concedes here that the maintenance suit was commenced within the juris-

diction of the New York Court and that at the time the judgment here sued on was rendered that Court had jurisdiction *in personam* over him * * *.

Since the New York Supreme Court had acquired and retained jurisdiction *in personam* over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance had terminated."

The New York Court having jurisdiction over the husband when it granted the third judgment, the Courts in Nevada were held bound to give it full faith and credit, and hence the merits of the case could not be collaterally attacked. The Circuit Court of Appeals therefore held that the plaintiff was entitled to her third judgment as well as to the first two allowed by the District Court.

The default judgment was held to be just as binding on the defendant as the two which were opposed.

Bassett v. Bassett, 141 Fed. 2d 954, shows similar facts. It was an action to enforce in Nevada judgments for arrears of alimony entered in an action in New York State. After the separation judgment had been obtained there, the husband obtained a divorce in Nevada. Mr. Bassett defaulted in the proceedings in New York to obtain the said money judgments.

The Court held that, as the New York Court had jurisdiction over Mr. Bassett, the judgments could not be collaterally attacked. The Court said (p. 955):

"In those (N. Y.) proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the original decree and been un-

successful, his recourse would have been in the Appellate Courts of New York and in the Supreme Court of the United States."

To have the situation the same here, it would have been necessary for petitioner to have defaulted in the plaintiff's present motion for money judgment and await suit upon these judgments in Nevada. He would then have been met with the same situation as met the defendants in these two cases, to wit, he would be faced with a valid judgment in New York which had complete jurisdiction to grant said judgment and would therefore be unable to attack its merits in the State of Nevada.

It was to prevent any such situation arising that the petitioner opposed the plaintiff's motion for a judgment. He is following the practice outlined in the *Bassett* case.

It is clear, therefore, that the *Durlacher* and *Bassett* cases in the Federal Courts considered solely matters of practice, namely, the procedural method which Mr. Durlacher and Mr. Bassett had adopted when their ex-wives applied to the New York Courts for money judgments for arrears of money. Instead of opposing those applications in the New York Courts upon the merits both suffered judgments to be entered by default and attempted, when those judgments were sued on in the U. S. District Court in Nevada, to there defend the actions on the merits, which they had failed to do in New York. The U. S. Courts held that they could not go behind the New York Courts which had jurisdiction to grant the judgments, and that Mr. Durlacher and Mr. Bassett should have followed the practice adopted by the petitioner here, to wit: oppose the New York applications on the merits and, if unsuccessful, appealing through the New York Appellate Courts to this Court.

POINT IX.**No Separation Agreement Is Involved in This Action.**

Mr. Justice Hallinan in his opinion (R. 82), refers to a finding by the Official Referee in the separation action "that the plaintiff and the defendant have entered into a separation agreement dated March 16, 1943, as amended by a stipulation dated April 1, 1943, and further amended by a letter dated April 12, 1943."

These papers are printed at R. 14 to 22. It is clear that these are not a separation agreement but a stipulation "subject to the approval of the court" (R. 15). An examination of the separation decree shows that the only provision of this stipulation included in the decree is the provision for \$180 a month for respondent's support (R. 13).

The opinion later refers to this clause in the following language (R. 88):

" * * * it is clear that the support and maintenance which was provided in the decree was based upon the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. It is difficult to perceive how the property rights thus established in plaintiff's favor could be wiped out by the subsequent decree of divorce obtained in a sister state by one of the parties to the agreement without the presence of or appearance by the other therein."

In making this comment, the learned Justice was clearly mistaken and his argument was ignored by the Court of Appeals in its opinion.

That stipulation was expressly subject to the approval of the court and obviously was made to save the time of

the court in receiving and considering evidence of the income, wealth, etc. of Mr. Estin.

A similar decree was before the New York Supreme Court in *Addis v. Addis*, 73 N. Y. Sup. 2d 843 (not reported officially). Mr. Justice Froessel said:

“I am satisfied that the parties in this case prepared such stipulation and agreement simply to avoid the necessity of adducing evidence at the inquest, and for the purpose of aiding the court, and that they intended that the terms of said stipulation, at least so far as alimony and support were concerned, were to merge in the decree and were not to survive it.”

It is apparent that the New York Court of Appeals took that view of the stipulation and did not consider the comment of Justice Hallinan merited consideration.

Conclusion.

For the above reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed, the courts of New York State be directed to deny the respondent's motion made in the New York Supreme Court for a money judgment for alimony accruing since the entry of the Nevada decree divorcing the parties, the petitioner should be granted such other relief as may be proper in the premises and be awarded the proper costs pursuant to statute and the rules of this Court.

Respectfully submitted,

JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel.

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CHARLES ELSONS REPLY
GLEZ

Supreme Court of the United States

OCTOBER TERM, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

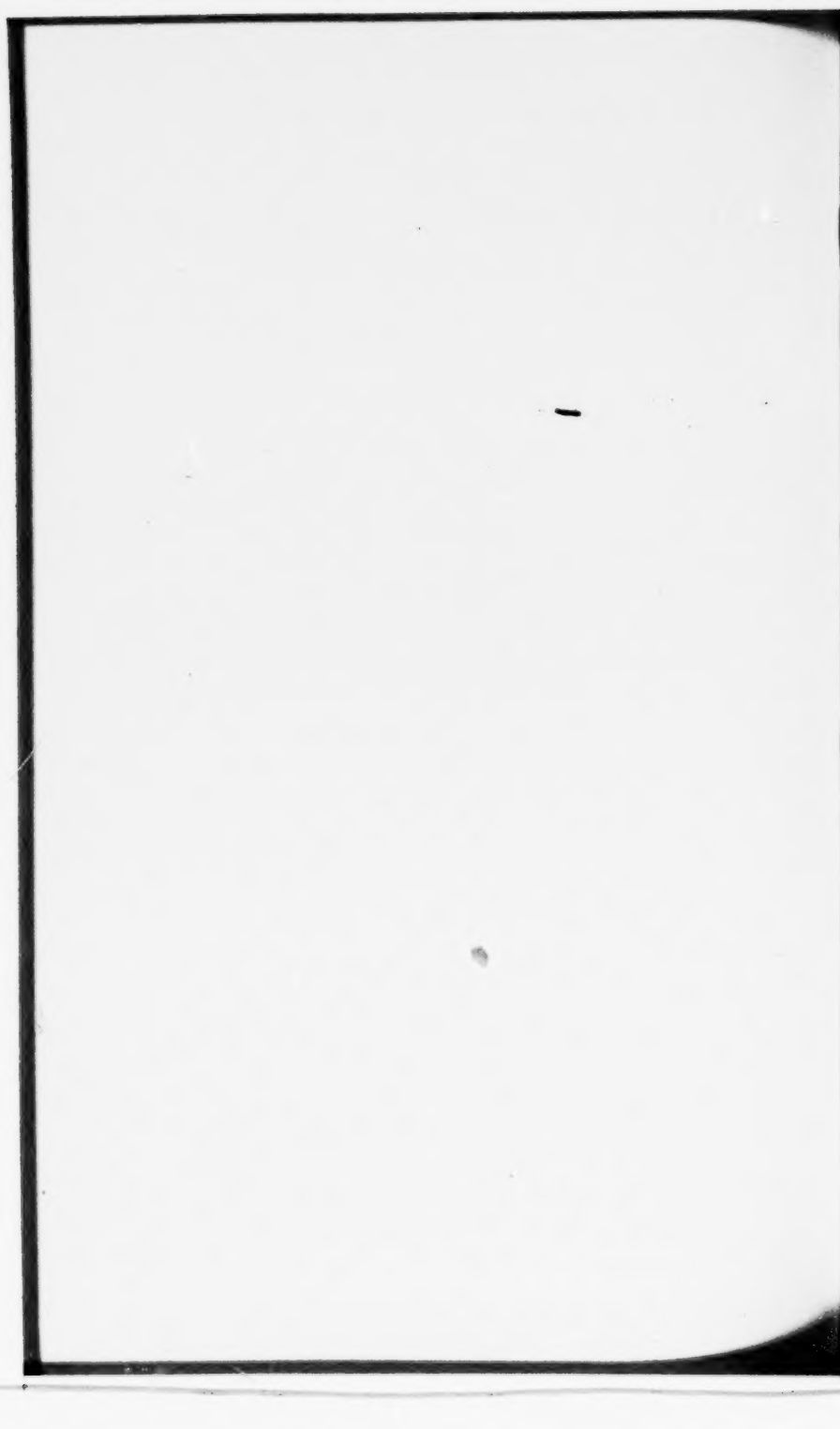
against

GERTRUDE ESTIN,

Respondent.

PETITIONER'S REPLY BRIEF

J
J
JAMES G. PURDY,
ABRAHAM J. NYDICK,
of Counsel.



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New York Civil Practice Act	
§ 1170	2

Supreme Court of the United States

OCTOBER TERM, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

against

GERTRUDE ESTIN,

Respondent.

PETITIONER'S REPLY BRIEF

Answering Point I of Respondent's Brief

It is true that alimony provisions of a separation decree are included therein as a result of statutory authority.

We pointed out on Point IV of our brief that these provisions are procedural remedies provided by statute ancillary to the decree (p. 11) Counsel for Respondent admits this (p. 14, Respt's Brief).

On page 14, Respondent refers to the stipulation of the parties, subject to the approval of the Court, as to the amount of alimony to be included in the separation decree, and says that the "common law obligations of her husband" do not create her right to alimony here.

No authority is cited because the able Counsel for the Respondent could find none.

See our discussion of this question on Point IX of our main Brief.

Answering Point II of Respondent's Brief

This point relates solely to the New York practice respecting modification of its separation decrees. The New York Courts in their judgments here under review have nowhere even hinted that our procedure in opposing Mrs. Estin's motion for a money judgment was defective. We followed the practice established by Section 1170 of the Civil Practice Act (quoted on p. 14 of our main Brief).

The New York Courts having held our procedure correct, it is obvious that this Court is not concerned therewith, unless that procedure violated some constitutional right of Mrs. Estin. There is and can be no such claim here.

Counsel for Respondent is in error when he says that the alimony in her New York decree was "fixed by the parties' separation agreement," hence untouchable.

We have demonstrated the fallacy of this argument on page 38, 39 of our main Brief. It is difficult to understand the magic by which a stipulation "subject to the approval of the court" can be transformed into a "separation agreement."

Obviously, the New York Court had power to accept or reject any portion or all of the stipulation. It actually rejected all but that which recommended the amount of alimony Mrs. Estin would receive if successful. Had the Court desired, it could have required proof of Mr. Estin's income and assets and then have fixed another sum as proper.

Had Mrs. Estin failed to satisfy the Court that she was entitled to a separation decree, it is also obvious that no alimony could have been awarded her. (Point IV, our main Brief, p. 11.)

In such an event there was nothing in the stipulation which gave her any right to collect \$180 a month from Mr. Estin.

The stipulation is just what it says it is, a stipulation subject to the approval of the Court and nothing more.

The cases cited on pages 16 to 18 on Respondent's brief do not uphold Respondent's argument that this stipulation was a "separation agreement."

Atkins v. Atkins, 326 U. S. 683, cited on page 18, reversed a separation decree obtained by the wife in Illinois with instructions "to re-examine the case "in the light of *Williams v. North Carolina* and *Esenwein v. Commonwealth ex rel. Esenwein*" and other cases. There Mr. Atkins had obtained a divorce in Nevada which had been disregarded by the Illinois courts when pleaded as a defense to the separation action.

Griffin v. Griffin, 327 U. S. 220, also cited on page 18, arose on certiorari to the Court of Appeals of the District of Columbia, which had granted a judgment for Mrs. Griffin upon a New York judgment for arrears of alimony under a separation decree. That New York judgment had been entered without notice to Mr. Griffin. This Court recognized that the New York statutes gave Mr. Griffin the right to oppose a money judgment for those arrears.

Mr. Justice Rutledge in his opinion (dissenting in part) said:

"Although this Court held in *Sistare v. Sistare*, 218 U. S. 1, that under New York law accrued instalments of alimony could not be modified, this is no longer the case in New York" citing cases.

An order had been made in 1936 in the New York action finding that Mr. Griffin was actually indebted for arrears up to October 1935, in a certain sum, and this

was an adjudication which this Court recognized. But the Court held to the contrary as to the subsequent arrears. This led to a reversal of the judgment.

This case recognizes the validity of our argument on Point V of our main Brief (p. 13).

Answering Point III of Respondent's Brief

On this point Respondent relies on three cases,

Durlacher v. Durlacher, discussed on pages 35 and 36 of our main Brief;

Bassett v. Bassett, discussed on pages 36 and 37 of our main Brief; and

Barber v. Barber, 323 U. S. 77, in support of her claim that Mr. Estin's divorce decree in Nevada had no effect on the alimony awarded Mrs. Estin in her separation decree.

Respondent says on page 29 of her Brief, that "The *Durlacher* and *Bassett* cases are parallel with the instant Estin Case" and on page 30, that in *Barber v. Barber*, 323 U. S. 77, "identical facts and circumstances were in issue."

These are clearly erroneous conclusions. We have already shown that the *Bassett* and *Durlacher* cases related to questions of practice not present here (See page 27 of our main Brief).

The *Barber* case considered one issue only, to wit:

Was a money judgment entered by a North Carolina Court for unpaid alimony in a separation decree made in that state, subject to modification by the Court and thus not a judgment upon which suit could be maintained in another state. Suit on this judgment was instituted in the Tennessee Chancery Court, and Mr. Barber interposed as a defense that the judgment was not final. The

Chancery Court held that the judgment was final. The Supreme Court of Tennessee held it was not final, and this Court held that it was final. No divorce decree was involved.

On page 28 of his Brief, Counsel for the Respondent says, referring to the *Durlacher* and *Bassett* cases

“It appears, conclusively, that Simon Durlacher and William I. Bassett, both of them, opposed their wives Orders to Show Cause for money judgments, respectively.”

This is clearly an erroneous statement. On page 27 of that Brief, he quotes from the opinion in the *Bassett* case in part as follows:

“In those proceedings (the return of the order to show cause) William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do.”

Mr. Durlacher appeared specially in his case (173 N. Y. Misc. 329) to contest the jurisdiction of the New York Court. From the opinion in 35 Fed. Sup. it appears that he also appeared specially on a second motion and defaulted on a third.

The cases here cited on Respondent's Brief are no authority supporting her claim.

Answering Point IV of Respondent's Brief

The statement of law at the head of this Point is correct.

Mr. Estin's wife, Mrs. Estin, had a common law right to be supported by him, a right which the New York statutes provided might be enforced by an alimony provision in her separation decree.

As Mr. Estin's wife, obviously, she was entitled to that support as long as she remained his wife, unless she forfeited that right by her own actions. And she could not be deprived of that right except by due process of law. The divorce obtained by Mr. Estin in Nevada was due process of law, and was recognized as such by the New York courts.

The erroneous conclusions drawn by Respondent's counsel from the cases cited on page 31 is clearly demonstrated by the authorities cited on Point V of our main Brief, and by the case of *Griffin v. Griffin*, 327 U. S. 220, cited by Respondent on page 18 of her Brief.

A wife's right to support by her husband is clearly a personal right, one based upon the marital relationship.

By no principle of law can it be held that that personal right is changed if the wife gets a separation decree which includes a provision for her maintenance.

In *Atherton v. Atherton*, 181 U. S. 162, the method of service of process in the Kentucky divorce action upon the wife in New York was the same as here, Mrs. Atherton, like Mrs. Estin, did not appear in the action. This Court held that Mr. Atherton's divorce decree was valid, and that it was a complete defense to Mrs. Atherton's later action for separation and alimony.

Mrs. Atherton's personal right to support was ended by the divorce decree, notwithstanding the Kentucky Court had no jurisdiction over her person.

Mrs. Estin's separation decree did not create for her any additional right to support from Mr. Estin. As we have shown, the alimony provision of that decree simply made more enforceable Mr. Estin's duty to support her.

Atherton v. Atherton, held that Mrs. Atherton's right to support from her husband ended with the divorce, for in reversing her judgment for a divorce from bed and

board and for alimony, there was no reservation to Mrs. Atherton of a claim for support.

We can find no legal principle upon which it may be said that Mrs. Estin's personal right to support from her husband was not ended by Mr. Estin's divorce decree simply because that right had been made more easily enforceable by a provision for alimony ancillary to her separation decree.

We believe that there is less reason to invoke a different ruling here than that applied in the *Atherton* case than there was to differentiate the basic principle in *Haddock v. Haddock* from that in *Atherton v. Atherton* when the *Haddock* case was overruled in *Williams v. North Carolina*.

Answering Point V of Respondent's Brief

On this point, respondent advances an argument ignored by the New York Court of Appeals in its opinion herein. She urges that the stipulation "subject to the approval of the Court" is not such but is a "separation agreement," and elaborates here the argument she makes on Point II of her brief, p. 16.

The argument on this point relates to that portion of the stipulation by which Mr. Estin appointed his then attorney "as his agent and attorney in fact to receive the service of any such process of paper", etc. Whether Mr. Estin could or could not cancel this appointment is immaterial to the Constitutional question presented by this record.

It is obvious that the stipulation speaks for itself and its construction is a matter of law. A finding by a Referee that it is a separation agreement does not make it such when, by its very terms, it is something else.

Counsel for respondent clearly draws upon imagination when he says that the language of Chief Judge Loughran,

quoted at the bottom of page 36 and top of page 37 of his brief, is applicable only if that paper is a contract.

The opinion of the New York Court of Appeals is directed to the alimony provision of the separation decree and is not applicable to a "separation agreement."

This is too clear for argument, for Chief Judge Loughran, in his opinion (R. 97), said:

"She was awarded permanent alimony of \$180 a month—an amount that *had been recommended in a stipulation* filed with the Court * * *." (Italics ours.)

Such plain language cannot be ignored.

Answering Point VI of Respondent's Brief

The Court of Appeals in its opinion held squarely to the contrary (R. 98, 99). Chief Judge Loughran, in his opinion, said:

"Although in this New York separation action, the husband was adjudged to have been solely to blame when he abandoned the wife in April, 1942, yet the Nevada Court was not thereby disabled from granting him an absolute divorce in May, 1945, upon the ground of his having then lived apart from the wife for a period of three years without cohabitation."

No case cited by counsel for respondent on Point VI is inconsistent with so much of the decision of the New York Court of Appeals as holds that the Nevada Court had power to make the divorce decree at Mr. Estin's suit, notwithstanding the New York separation decree.

The Nevada Courts have also held that a separation decree such as Mrs. Estin has is no defense to an action for divorce in Nevada based upon the statute permitting such an action where the husband and wife have lived apart for five (now three) years without cohabitation.

George v. George, 56 Nev. 12.

The issues in the New York separation action here were not those in the Nevada action. In this action the issue was, did Mr. Estin desert Mrs. Estin. In the Nevada action the issue was, had the parties lived apart without cohabitation for three years.

On page 45 respondent cites *Vickers v. Vickers*, 45 Nev. 274, but the analysis on that page is misleading.

There were two appeals. In 45 Nev. 274, the Court considered a defense which had been pleaded in the divorce action. This defense pleaded as *res judicata* that the issues presented by the pleadings had been previously decided against the plaintiff in a West Virginia Court. Those facts were admitted by the reply, and the Court held that the plaintiff was bound by a former judgment.

In the decision in 45 Nev. 288, 202 Pac. 31, a different question in the same case was considered. The Court said (p. 295):

"The mere fact that an issue has been once adjudicated does not oust the same or any other Court of jurisdiction to hear and determine it again. This is elementary. In the Code states the defense of former adjudication is new matter, which must be pleaded if an opportunity is afforded to do so, * * * and if this is not done the Court has jurisdiction to enter a binding judgment thereon—one that will not be open to attack by way of a motion to set it aside on the ground of former adjudication, for want of jurisdiction to enter it."

That a plea of *res judicata* in and of itself does not oust the Court of jurisdiction, see:

Hollenbeck v. Aetna Casualty & Surety Co., 215 A. D. 609; 214 N. Y. S. 402, aff'd 243 N. Y. 540;
Baird v. Superior Court in and for City and County of San Francisco, 26 P. 640, 204 Cal. 408;

Svalins v. Saravanna, 173 N. E. 281; 341 Ill. 236, 87 A. L. R. 821;
Fiannacco v. Booth & Co., 39 F. (2d) 639 (D. C., N. Y.), aff'd 46 F. (2d) 1014;
Pfeffer v. Corey, 211 Iowa 203, 233 N. W. 126;
Wollard v. Home State Bank, 121 Kan. 474; 247 P. 868, cert. denied 273 U. S. 674;
Massilon Savings & Loan Co. v. Imperial Finance Co., 114 Ohio St. 523, 151 N. E. 645.

These decisions make clear this proposition of law.

A former adjudication by another Court in another state, does not oust the second Court from jurisdiction over the matter. The judgment of the first Court must be pleaded and proven in the second Court, otherwise the latter Court may make a judgment which must be given full faith and credit under the Constitution.

Hence the plaintiff here, if she believed that her separation decree was a valid defense to Mr. Estin's suit for a divorce in Nevada, was under an obligation to affirmatively plead and prove that decree in the Nevada suit. She elected not to do so. Hence she permitted the Nevada Court to act on her default in appearing or pleading, resulting in a decree of divorce which the Nevada Court had jurisdiction to make. She is bound by that decree just as firmly as were the defendants in the *Bassett* and *Durlacher* cases, considered on pages 35 to 37 of petitioner's brief.

Barber v. Barber, 21 Howard 582, has been discussed on pages 26 and 27 of our main brief.

Harding v. Harding, 198 U. S. 317, quoted on page 46 of respondent's brief, is obviously not in point. Mrs. Harding there did just what Mrs. Estin here did not do. She appeared and contested her husband's divorce action. She did not permit the decree to go against her by default.

We fail to see the slightest effect that *Atherton v. Atherton*, 181 U. S. 155, has in sustaining respondent's argu-

ment on this point. There Mr. Atherton obtained a divorce in his home state of Kentucky against his wife then living in New York, who was not served in the Kentucky action and did not appear therein.

This Court in *Williams v. North Carolina*, first appeal, held that the principle of *Atherton v. Atherton* was inconsistent with *Haddock v. Haddock*, 201 U. S. 562, and overruled that latter case.

In no case cited by the respondent has it been held that a defendant who has permitted a judgment by default against him by a Court having jurisdiction of the subject matter may contest the merits of that judgment in another jurisdiction.

If the Nevada Court had made a mistake of law in deciding what effect to give Mrs. Estin's separation decree, that error could not be raised by her collaterally. A judgment cannot be impeached either in or out of the state by showing that it was based on a mistake of law.

American Express Co. v. Mullin, 212 U. S. 312, 29 S. Ct. 381;

Indemnity Ins. Co. of N. A. v. Smoot, 152 F. (2d) 667; 80 U. S. App. D. C. 278; cert. denied 66 S. Ct. 981;

Phillips v. Griffen, 259 N. Y. S. 102, 236 A. D. 209.

As the Nevada Court had jurisdiction over Mr. Estin, any error of law that Court made could be corrected only by an appeal to the Nevada Appellate Courts and then to this Court.

Bassett v. Bassett (*supra*);

Durlacher v. Durlacher (*supra*).

Answering Point VII of Respondent's Brief

That which may be public policy in New York is not necessarily public policy in Rhode Island, California, Nevada, or any of the other states.

The "Public Policy" of New York received a shock from the decision of this Court in *Williams v. North Carolina* (first appeal) for which it is still trying to find a remedy. (*Russo v. Russo*, 62 N. Y. Sup. (2d) 514, quoted at page 18 of our main brief.)

The cases of *Gray v. Gray*, 61 Fed. Supp. 397, cited on page 49 of respondent's brief, and *Security Trust Co. of Rochester v. Woodward*, 73 Fed. Supp. 667, and those cited on page 55, are simply illustrative of the divergent opinions held by the Courts of the various states as to the extent that a valid divorce decree affects the parties. We note that the latter case was decided largely upon the authority of the Court of Appeals' decision in this case and was affirmed by the Circuit Court of Appeals also on the authority of *Esenwein v. Esenwein*, 325 U. S. 279, and *Bassett v. Bassett*, 141 Fed. (2d) 954.

It is obvious that neither of the last cited cases support the judgment except the minority opinion in the *Esenwein* case. The decision is contrary to the opinion of the majority of this Court in that case.

Of the cases cited on page 54, *Bennett v. Tomlinson* and *Miller v. Miller*, Iowa cases, were decided years before this Court decided *Williams v. North Carolina*.

Respondent's answer on page 56 to our hypothetical case is interesting. He would compel Mr. A. to leave his home state and go nearly 3,000 miles to the state of domicile of his adulterous wife to sue for a divorce because of her conduct.

But suppose in the meantime she has become domiciled in South Carolina, where no divorces are granted?

Under the doctrine of *Estin v. Estin*, Mr. A., although possessed of a valid divorce in Arizona, must continue to pay to his adulterous ex-wife as long as she lives alimony awarded by her New York separation decree.

On page 57 respondent urges that if the judgment here is reversed, "thousands of men all across the country" will use the judgment of this Court as an easy method of terminating their liability to pay their wives the alimony theretofore awarded them by separation decrees.

This argument is clearly specious. It assumes that a wife is helpless if she is obliged to defend her husband's action begun in a state other than her own.

The courts of each state are vigilant to protect the rights of a wife who appeals to it for protection. Specimen cases are *Harding v. Harding*, 198 U. S. 317, arising in California, cited several times on respondent's brief, and *Vickers v. Vickers*, 45 Nev. 274 (see p. 45, Respondent's Brief).

Mrs. Estin had full opportunity to appear in Mr. Estin's divorce action in Nevada; under §9465 of the Nevada General Laws, she would have been entitled to an order requiring Mr. Estin to pay such sums as may be necessary "to enable the wife to * * * defend such suit and for her support." It would be reversible error for the Court to refuse.

Drespel v. Drespel, 56 Nev. 366.

This right includes the expenses of an appeal.

Lamb v. Lamb, 55 Nev. 437.

The Court had full power to grant her proper permanent alimony (§9463).

Briefly, the Courts of Nevada are as zealous to protect the rights of a wife who seeks to have her rights protected as are the Courts of New York or of any other state.

Every American is a citizen not only of some particular state, but of the United States. Each has a constitutional right to travel between the several states or obtain a new domicile in any of them, at his or her pleasure. We have 48 states, the District of Columbia, and territories, each with its own laws governing divorce. With over 50 such independent laws, it is manifestly impossible to prevent inconvenience in individual cases. The utmost that can be done is to afford an opportunity to any spouse to oppose the other's suit wherever started. It is no more a hardship for a wife in New York to contest her husband's suit in Nevada for a divorce based on one's year's willful desertion (Nev. G. L. 9460, subd. Third) than it would for a husband in Nevada to contest an action for a divorce brought in New York upon an unfounded claim of adultery.

The laws of both states require that each wife be furnished with funds by her husband to defend herself.

Any state that did not do so would soon meet with a stern rebuke from this Court.

These cases cannot be decided on sympathy for either a husband or for a wife in each particular case. They must be decided on the fundamental principles of law governing the obligation of a husband to support his wife.

We cannot say that our mythical Mr. A is relieved from paying alimony to his divorced adulterous ex-wife by his divorce decree, but that Mr. Estin is not relieved from paying alimony to Mrs. Estin by his divorce decree, and *visa versa*.

The doors of the Nevada Courts were open to her, the Nevada laws required that those Courts see that she was furnished with funds by her husband for her defense. She refused to exercise those rights.

CONCLUSION

The judgment should be reversed as prayed for on our main brief.

JAMES G. PURDY,
ABRAHAM J. NYDICK,
of Counsel.

JUL 29 1947

CHARLES ELMORE DRUPLAY
CLERK

IN THE
Supreme Court of the United States

October Term, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
APPLICATION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF
NEW YORK**

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IN THE
Supreme Court of the United States
October Term, 1947

No. 139

JOSEPH ESTIN,

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v.

GERTRUDE ESTIN,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO THE
GRANTING OF A WRIT OF CERTIORARI**

Statement

Petitioner's summary statement of the case is incomplete. This necessitates a brief additional statement.

The parties to the Action for a Separation on March 16th, 1943, *et seq.*, in the original action which resulted in the judgment of Separation and for alimony for respondent's (plaintiff below) support and maintenance which is the basis for the proceeding which resulted in the money judgment pursuant to Section 1171 B of the New York Civil Practice Act from which judgment the appeals herein have been taken (R. 12-23), entered into an agreement also referred to as a stipulation, by which the petitioner promised and agreed to pay the respondent \$180.00 per month for her support and this amount was to be written into a

decree, it entered (R. 25, 28, 33) and the means were in the agreement stipulated for the respondent (plaintiff below) to enforce her rights under the stipulation or under a decree, if entered (R. 28).

This stipulation or agreement was on September 29th, 1943 found as a fact by the Official Referee in the Action for a Separation to be a "Separation Agreement" (R. 127).

On October 11th, 1943, the Supreme Court of New York, Queens County, signed the judgment in the Action for a Separation herein. Therein "the report of the official referee was duly confirmed, ratified and approved in all respects" (R. 128) and thus it was adjudged as a matter of law that the agreement or stipulation above referred to is a Separation Agreement between the parties hereto. The Separation Agreement is referred to as a stipulation in the opinion of Chief Judge Loughran of the Court of Appeals of the State of New York (R. 158) sought to be appealed from. The consideration for the Separation Agreement from the Respondent to the Petitioner was a separate, distinct and valuable consideration, entirely separate and apart from their marital relations and the petitioner's obligation to support his wife (R. 95, 96).

In the divorce action by the petitioner against his wife, the respondent, in Washoe County, Nevada, in May 1924, process was served upon the respondent by publication, pursuant to the provisions of the laws of the State of Nevada (R. 129). The respondent, defendant, in the Nevada divorce action, was never in Nevada, she was not served with process in Nevada and did not enter her appearance personally or by attorney (R. 47, 110, 129, 158).

Argument

I. No Constitutional issue is raised by the petition either in form or in substance.

II. The issue the petitioner attempts to raise has been resolved repeatedly by the decisions of this Honorable Court.

The petitioner on page 3 of his petition and brief herein under "Questions presented", asks:

"Do the provisions of Art. IV, Section 1, of the United States Constitution require that the State Courts of New York give the same effect to the valid decree obtained by the petitioner in Nevada upon due notice of process served personally on the respondent in New York and not upon the service of process on the respondent within the jurisdiction of the Nevada Court and without her personal appearance in that action, as would be given had the respondent been personally served within the jurisdiction or had appeared in that action?"

"Do the decisions of the State Courts of New York made before the decision of this Court in *Williams v. North Carolina*, 317 U. S. 287, adjudging that the liability of a husband to pay alimony under a separation decree made in a New York Court terminates without qualification when a valid divorce is granted by a Court in any state, fix the law as to such liability in and require it to be applied in this case?"

As to the first question, this Honorable Court has answered it firmly in the negative many times.

No court under our system of jurisprudence has power to render a personal judgment against one who resides beyond the territorial limits of the court upon constructive service upon him in the place of his residence and without

personal service of process upon him within the jurisdiction of the court or after his voluntary appearance. Such action is beyond the jurisdiction of the Court and any judgment so rendered is void and therefore not protected by the full faith and credit clause of the Federal Constitution. The enforcement of such a judgment in another jurisdiction would be deprivation of property without due process of law.

Penmoyer v. Neff, 95 U. S. 714;
Williams v. North Carolina, 317 U. S. 287 at 293;
D'Arcy v. Ketchum, 11 How. 165;
Chase v. Wetzler, 225 U. S. 79 at 86;
Bigelow v. Old Dominion Copper Co., 225 U. S. 111 and many other cases.

As pointed out below, the case of *Williams v. North Carolina*, 317 U. S. 287, upon which the petitioner relies, in itself makes the distinction of the difference in effect of such a divorce decree, without personal service or appearance of the defendant within the jurisdiction of the Court, in dissolving the marital status and as affecting property rights.

The Court wrote at page 193:

“Thus we have here no question as to the extra-territorial effect of a divorce decree insofar as it affects property in another state.”

As to the second question, the petitioner seeks to create an inference which does not exist. Nowhere does he cite a case, as indeed he cannot, that any New York Court ever adjudged that a judgment and decree of divorce of any state, including New York, which was obtained in an action in which the defendant was not personally served with

process within the jurisdiction of the Court and who did not personally or by attorney appear in the case and place himself within the Court's jurisdiction, had the effect of superceding or annulling or in any way putting an end to the wife's right to collect alimony under a prior Separation judgment.

In the instant case the New York Court of Appeals, and the Courts below, gave full faith and credit to the May 24th, 1945 judgment of divorce of the Nevada Court granted to the Petitioner herein against the Respondent herein (R. 159). They gave it all the faith and credit any Nevada Court could give it. The New York Court has given to it the same full faith and credit which it has in Nevada.

The petitioner's counsel in his brief has not cited one case in which it appears that the Courts of Nevada hold that a divorce granted in that state against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the state of her domicile.

The case that is cited, *Herrick v. Herrick*, 55 Nev. 59, 68, is not in point and does not support petitioner's contention. The *Herrick* case in which Mrs. Herrick appeared personally and contested the divorce action commenced by her husband, held only that the prior separation decree obtained by Mrs. Herrick in a California State Court which had personal jurisdiction of both Mr. and Mrs. Herrick, was not res adjudicata of the facts to be tried in the Nevada divorce court and therefore the Nevada Court was not barred by Art. IV, Sec. 1 of the United States Constitution from trying Mr. Herrick's divorce action and granting to him a divorce. It did not decide and the question was not before the Nevada Court as to the effect of its divorce decree on the California Separation judgment. In any event,

since Mr. and Mrs. Herrick were both in the Nevada Court and within its jurisdiction, the question was not before that court and not decided, as to the effect of a Nevada divorce on a prior Separation judgment and a wife's right to collect alimony thereunder, when the wife was not within the jurisdiction of the Nevada Court and had not been personally served with process within its jurisdiction and had not appeared in Court personally or by attorney, which is the sole question decided by the New York Court of Appeals in the instant case.

They did not cite any such case in their briefs in the Courts below as appears in the opinion of Chief Judge Loughran (R. 162). There is no reason to infer that Mrs. Estin would not have got the same judgment in Nevada as she got in this proceeding in the New York Supreme Court, Queens County.

There is no Federal question involved. No where in his brief does the petitioner's counsel state a single instance or cite a case which shows that the New York Court of Appeals in the instant case has not carefully followed the decisions of this Honorable Court and applied Article IV, Section 1 of the United States Constitution to the facts of this case, as it has been universally applied by this Honorable Court and the highest state Courts in the land.

The petitioner's counsel in his brief has not cited a single case which contravenes or makes an issue with the cases cited by the respondent's counsel herein and has presented no issue or question of law to be decided by this Honorable Court which it has not decided frequently before, adversely to the contentions of the petitioner.

Exactly the same issues presented in the instant case have been on five different occasions determined by this Court adversely to the petitioner's contention.

Barber v. Barber, 21 How. (62 U. S.) 582;
Sistare v. Sistare, 218 U. S. 1;
Barber, Stella v. Barber, George, 323 U. S. 77, 79,
 80, 81;
Durlacher v. Durlacher, 123 Fed. 2nd 70. Certiorari
 denied, 315 U. S. 805;
Bassett v. Bassett, 141 Fed. 2nd 954. Certiorari
 denied, 323 U. S. 718.

Barber v. Barber, 21 How. (62 U. S.) 582 decided in 1859 has remained unquestioned law in this Honorable Court, being approved fifty years later in *Sistare v. Sistare*, *supra*, and again sanctioned by this Court in denials of writs of certiorari in *Durlacher v. Durlacher*, *supra* and *Bassett v. Bassett*, *supra*.

In the *Barber* case, a husband, against whom a separation judgment was rendered in New York, went to Wisconsin and obtained a default divorce on a ground found to be untrue in the separation action. His wife then sued in a Federal court in Wisconsin to recover alimony due under the separation judgment and the husband relied upon his default divorce. The Court, in affirming the decision below, held that the wife was entitled to maintain the action, and stated, regarding the divorce (p. 588):

"It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the vinculum of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this Union, or in a Court of the United States, where the defendant may be found,

or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

This decision was followed in *Sistare v. Sistare*, 218 U. S. 1, 11-15 (1910) and was cited with approval and followed in *Barber, Stella v. Barber, George*, 323 U. S. 77, 80 (1944).

The contention of the husband was also rejected by the Circuit Court of Appeals for the Ninth Circuit in *Durlacher v. Durlacher*, 123 Fed. 2nd, 70 (C. C. A. 9th, 1941), cert. den, 315 U. S. 805 (1941). In that case the wife recovered a judgment of separation against her husband in New York in 1934. Later the husband became a resident of Nevada and obtained a default divorce there on constructive service. The wife then sued in the Federal Court in Nevada to recover three unpaid money judgments for unpaid instalments of alimony due under the separation judgment, the first two having accrued before the divorce and the third thereafter. The lower Court permitted recovery of the first two judgments, but held that recovery of the third was barred by the default decree. The latter ruling was unanimously reversed on the ground that the separation judgment was entitled to the same faith and credit to which it was entitled in New York, stating (p. 71):

"Since the New York Supreme Court had acquired and retained jurisdiction in personam over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated.

"Nevertheless in New York, Simon could have brought a suit in which he would have been entitled

to show that the Court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in that maintenance proceeding. However, he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the loss of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that State. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction.

"Simon contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada Law was claimed to be that, upon the dissolution of the marital tie, the court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. That is to say, the Nevada Federal Court could refuse to recognize the New York judgment because repugnant to Nevada Law.

"The Supreme Court has repeatedly held that under the full faith and credit clause of the Constitution (extended by the statute to the court below), a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it."

The above decision was followed and reaffirmed by the same Court on substantially the same facts in the later case of *Bassett v. Bassett*, 141 Fed. (2nd) 954 (C. C. A.

9th, 1944) cert. den. 323 U. S. 718 (1944). A husband who was residing with his wife in New York, left the state in August 1943 and became a resident of Nevada. In the same month the wife sued for a separation in New York and later obtained a judgment there awarding alimony. In 1939 the husband obtained a default divorce in Nevada on constructive service and later defaulted in paying alimony under the separation judgment. The wife then sued in the Federal Court in Nevada to recover such installments. The husband argued that since he had a *bona fide* domicile in Nevada his default divorce was entitled to full faith and credit under *Williams v. North Carolina*, 317 U. S. 287 (1942) decided a year earlier, and hence his decree barred recovery under the separation judgment. On this reasoning, the lower Court dismissed the complaint but that ruling was unanimously reversed on the ground that the *Williams* case has nothing to do with such an issue, the Court stating (p. 955):

“In the case of *Durlacher v. Durlacher*, 9 Cir. 123 Fed. 2nd 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of a court of another state. Counsel argue that the *Durlacher* case was decided upon the theory of *Haddock v. Haddock*, 201 U. S. 562, that the *Haddock* case was reversed by *Williams v. North Carolina*, 317 U. S. 287 and therefore that the *Durlacher* case is not a precedent upon which a decision in the instant case can be rested.

“We believe that the *Williams* case does not affect the result reached in the *Durlacher* case. The State of New York had acquired jurisdiction over both

parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned herein. In those proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the original decree and been unsuccessful, his recourse would have been in the appellate courts of New York and in the Supreme Court of the United States.

"As here presented we are asked to accept the decree of a Nevada Court which, in effect, attempts to set aside decrees or judgment of a court of New York. This is the point in this appeal and *Williams v. North Carolina*, supra, has absolutely nothing to do with it."

The refusal of the Supreme Court to review the above decision is significant and would clearly seem to indicate agreement with the reasoning of the Circuit Court of Appeals.

The application for a Writ of Certiorari in the above case of *Bassett v. Bassett* was denied in October 1944. Two months later in December 1944, the Supreme Court decided the case of *Barber, Stella v. Barber, George*, 323 U. S. 77, supra, in which identical facts were in issue and this Honorable Court in its decision cited and followed the same cases and precedents as were cited and followed in the *Durlacher* and *Bassett* cases and in the instant case. Constant iteration and reiteration of the same law and cases is not called for every time such a matrimonial action is carried to the Court of last resort of a state. No different or novel aspect of the problem is presented by the petitioner here.

The petitioner in his brief in paragraph 4 on page 5, seizes upon dicta in the closing lines of the last paragraph of the Opinion of the New York Court of Appeals, "Consequently as we shall assume, the common law of Nevada does not differ in that regard from the common law of New York", to build a straw man to put forth the fallacious and baseless proposition that "the Common Law of New York is that the duty of a husband to support his wife terminates when the relation of husband and wife ends", and so the petitioner hopes to create the erroneous impression that the decision of the New York Court of Appeals in the instant case is contrary to the common law and thus presents a new and different aspect of the point definitely decided by the above cited cases and therefore should be reviewed.

The decision of the New York Court of Appeals herein is not in conflict with the common law or any common law rights of the petitioner.

There is no common law of divorce in New York State. Divorce and Separation in New York are wholly statutory.

Borenstein v. Borenstein, 270 N. Y. Sup. 688, judgment affirmed 272 N. Y. 407.

The Courts of New York have no common law jurisdiction over the subject of divorce and their authority is confined altogether to the exercise of such incidental powers as are conferred by statute and beyond the limits prescribed by statute the court has no power to go. Aside from the statute no New York Court has power to decree an absolute divorce or a separation and alimony. Neither the Common Law Courts nor the Court of Chancery in England have ever possessed that power. Hence the courts here never succeeded to it. They can exercise no power on the

subject of divorce except what is expressly specified in the statute.

Peuguet v. Phelps, 48 Barb. 566;
Galusha v. Galusha, 43 Hun. 181;
Erkenbrach v. Erkenbrach, 96 N. Y. 456;
Romaine v. Chauncey, 129 N. Y. 566 at 571;
Cotter v. Cotter (1906), 225 Fed. 471.

In New York State and all across the country thousands of men are paying alimony to support their ex-wives pursuant to divorce decrees granted by courts of competent jurisdiction; and that not because of a supposed punishment for a wrong done by the husband to the injured wife.

In an annulment case, where there is no fault in either party, the husband may be required to pay money to support his ex-wife.

“Where an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires. * * * This section shall apply to any action brought by either the husband or the wife or by any other person in the lifetime of both parties to the marriage.” (1940)

Section 1140—a *New York Civil Practice Act*.

Anonymous v. Anonymous (1940), 174 Misc. 496;
Frankel v. Frankel (1941), 262 App. Div. 770;
Cohen v. Cohen (1941), 262 App. Div. 765.

Under the law of New York it appears, indeed, as if a man may be required to support two wives.

Krauss v. Krauss, 282 N. Y. 355.

In the above *Krauss* case it appears to be a moot question, which, if either, of the two women involved was the ex-wife.

Thus it is seen that the petitioner's contention that a husband cannot be compelled to support an ex-wife is reduced to a *reductio ad absurdum*.

The respondent has vested property rights to the alimony awarded by her separation decree as to past due instalments.

The New York Court of Appeals in its Opinion (R. 162) cited *Livingston v. Livingston*, 173 N. Y. 377. Petitioner's counsel, on page 6 of his brief, writes "this is clearly a mistake" and cites the later case of *Karlin v. Karlin*, 280 N. Y. 32. In the *Karlin* case the New York Court of Appeals distinguishes the case of *Livingston v. Livingston*, *supra*, but did not reverse it. In the *Karlin* case the New York Court of Appeals held that the case of *Livingston v. Livingston*, *supra*, was not in point to maintain the argument that the Supreme Court of New York had not power under an amendment to Section 1170 of the Civil Practice Act of New York, to modify the alimony provisions in a divorce decree after the entry of final judgment, inasmuch as the amendment was added to the statute after the decision of *Livingston v. Livingston*, *supra*.

After the passage of the amendment by the New York Legislature, the New York Court of Appeals again, in the case of

Harris v. Harris, 259 N. Y. 334, 337

pronounced the same determination of New York Law as it pronounced in the present case. In its opinion the Court wrote:

"These past due sums have become vested rights of property in the plaintiff which the Supreme Court has no right to take from her."

Later the New York Court of Appeals, and after the decision of the *Karlin* case in 1939, *supra*, in the case of

Waddy v. Waddy (1943), 290 N. Y. 247

held that:

"Chapter 161 of the laws of 1938 amending present section 1172-c of the Civil Practice Act so as to provide, in substance, that the court may annul provisions in a final judgment directing payment of money in support of a wife, is not retrospective and the Supreme Court has not power under such amendment, to annul the provisions in a final judgment directing payment of money to support a wife, where the wife is habitually living with one not her husband and holding herself out as his wife.

"Even though the legislature had indicated by express declaration its intent that the Act should have retroactive application, it would not be effective as to decrees entered prior to the date it went into effect since the right of the wife to alimony *became a vested property right upon the entry of the judgment and could not be affected by subsequent legislation.*

"The Court was not entitled in its sound discretion to modify the alimony provisions under Section 1170 of the Civil Practice Act since that section does not authorize annulment of the alimony provisions for misconduct of wife."

To the same effect is the opinion of the Court of Appeals in

Hayes v. Hayes, 220 N. Y. 596.

So, in the present case, the New York Supreme Court did not have power to modify the alimony provisions of

the Separation judgment herein, under sections 1165 and 1170 of the Civil Practice Act of New York because the reason given for asking the modification, in the defendant's motion herein for that relief (R. 105, 112, 114), to wit his Nevada divorce judgment, is not one of the grounds for annulment or modification of a Separation provided in sections 1165 and 1170 of the New York Civil Practice Act, which are the statutes which apply.

Gewirtz v. Gewirtz, 189 App. Div.

In this case the Court held:

“The Separation decree continues in full force and effect so long as no order revoking the decree was made pursuant to section 1767 of the Code of Civil Procedure (now Section 1165 of the Civil Practice Act) which section provides the exclusive method of revoking or terminating a decree of separation.”

It is the settled law of New York that the only method by which a decree of separation can be revoked is today as above decided by the Appellate Division of the Supreme Court and it can be done only in an appropriate proceeding brought for that purpose strictly within the terms of the statute.

Sistare v. Sistare, 218 U. S. 1 (*supra*).

In this respect the Opinion of the New York Court of Appeals herein is exactly in line with the reasoning and analysis of New York Law as contained in the opinions of the United States Circuit Court of Appeals for the Ninth Circuit in the above cited cases of *Durlacher v. Durlacher*, *supra*, and *Bassett v. Bassett*, *supra*. In the *Durlacher* and *Bassett* cases the Court held that Messrs. Durlacher and Bassett could have appeared in the New York Courts

and interposed any defense they had to their respective wives motions for judgment and not having done so the New York judgments for arrears of alimony were final and could not be collaterally attacked. Here the petitioner came into court at the inception of the proceedings for a money judgment and interposed the best and only defense he has—his Nevada divorce. Under the New York statute this is not one of the grounds given for annulling or modifying a Separation judgment and the Court has no discretion to go outside the limits set by the statute.

The question sought to be raised involves the substantive law of the State of New York regarding the duty of a man to support his wife and the New York Court of Appeals has stated the New York law and decided the question in the instant case and in

Kreiger v. Kreiger, 61 N. Y. S. 2nd 665 (Sup. Ct. N. Y. Co. 1946) aff'd 271 App. Div. 872 (1946); affirmed N. Y. Ct. of Appeals (1947). New York Law Journal, July 7th, 1947.

The doctrine laid down by the Court of Appeals is in accord with sound public policy.

Recent decisions of the Federal Courts are in accord with the Opinion of the New York Court of Appeals. In

Gray v. Gray, 61 Fed. Supp. 367 (E. D. Mich. 1945)

a husband avoided service in his wife's separation action by going to Nevada where he obtained a default divorce. He later returned, the wife recovered a separation judgment awarding alimony, and when he refused to pay she obtained a contempt order. He then sued in the Federal Court for an injunction to prevent the enforcement of the contempt order on the theory that his Nevada decree was

a bar. His contention was rejected in an opinion stating that the *Williams* case distinguishes between marital status and property rights and that the Nevada divorce did not prevent enforcement of the separation judgment.

The courts of other jurisdictions have refused to nullify a wife's rights to alimony under a judgment because of a foreign divorce. *Manney v. Manney*,—Ohio—59 N. E. 2nd 755 (1944); *Price v. Ruggles*, 244 Wis. 187; 11 N. W. 2nd 513 (1943); *Bennett v. Tomlinson*, 206 Iowa 1075, 221 N. W. 837 (1928); *Simonton v. Simonton*, 40 Idaho 751, 236 Pac. 863 (1925) annotated 42 A. L. R. 1375; *Van Ingwagen v. Van Ingwagen*, 86 Mich. 333, 49 N. W. 154; *Wagster v. Wagster* (Arkansas), 103 S. W. 2nd 639; *Bolton v. Bolton*, 86 N. J. L. 626, 92 Atl. 391; *Bennett v. Bennett*, 63 N. J. Eq. 308; *Arrington v. Arrington*, 127 N. C. 195; *Chappel v. Chappel*, 86 Md. 543; *Rogers v. Rogers*, 46 Ind. App. 509, 89 N. E. 903, 92 N. E. 664.

Within the last few weeks two cases have been decided in the Federal Courts in the Southern District of New York, or rather one case decided in the District Court on May 28th, 1947 and the judgment in the same case affirmed on Appeal in the United States Circuit Court of Appeals, Second Circuit on July 1st, 1947. In

Security Trust Co. of Rochester, N. Y. v. Woodward and Woodward, District Court of the United States, So. Dis. of New York, John Bright, J.,

Mr. and Mrs. Woodward lived and married in New York. They separated and Mrs. Woodward sued in New York for a separation and support for herself and minor son. Mr. Woodward was served personally in New York and

appeared and contested the action. Judgment of separation and custody of the minor son was granted to Mrs. Woodward and she was awarded substantial alimony for the support of herself and her son. Mr. Woodward went to Nevada and stayed there sufficient time to acquire a domicile and commenced an action for divorce there against his wife in New York. Mrs. Woodward was not in Nevada, was not served personally within the jurisdiction of the Nevada Court and did not voluntarily place herself within its jurisdiction by appearance in person or by attorney. Woodward removed all his property and possessions out of the State of New York except the trust funds in the bank of the plaintiff, The Security Trust Co. of Rochester, N. Y., which trust had been sequestered in proceedings started in the Supreme Court of the State of New York to collect her alimony. Woodward undertook to stop the payment to her. The Trust Company interpleaded both Mr. and Mrs. Woodward in the action brought in the United States District Court for the So. Dist. of N. Y. Mr. Woodward set up the claim that his Nevada divorce superceded and annulled Mrs. Woodward's Separation judgment and was a bar to her collecting any more alimony from the plaintiff, Trust Co.

On the above facts Judge Bright of the U. S. Dist. Ct. rejected the husband's contention as unsound and held that the wife was entitled to summary judgment awarding to her the funds on deposit in the action and entitling her to continue to receive support under the separation judgment regardless of the status of the Nevada divorce as such. His opinion, dated May 20, 1947 shows that the law is clear and admits of no doubt, stating:

“As the provisions in New York for alimony ~~were~~ *in personam*, that portion of the Nevada decree *in rem* did not affect or abrogate the alimony provisions in the New York judgment. The Nevada court did not have jurisdiction of Mrs. Woodward *in personam*; she was not served with process in Nevada; she did not submit to jurisdiction there; and her property rights, established by a valid judgment (to which also full faith and credit must be accorded), were not affected.”

Mr. Woodward appealed and the Circuit Court of Appeals, 2nd Circuit consented to hear the appeal without delay on the typewritten record. On July 1st, 1947 the ruling of Judge Bright was unanimously affirmed in a decision reading as follows:

“*PER CURIAM*: Affirmed on the authority of *Esenwein v. Esenwein*, 325 U. S. 279; *Estin v. Estin*, 296 N. Y. 308; and *Bassett v. Bassett*, 141 Fed. 2nd, 954 (C. C. A. 9).”

Significantly, the decision of the U. S. Cir. Ct. of Appeals, 2nd Cir. above, cites as authority for affirmance the very case upon which the petitioner places principle reliance in his brief on this application (*Esenwein v. Commonwealth of Pa. ex rel. Esenwein*, 325 U. S. 279).

On July 15th, 1947, the U. S. Cir. Ct. of Appeals denied Mr. Woodward's motion for a stay pending an application for a writ of certiorari.*

The impression which petitioner's counsel seeks to create, that the opinion of the New York Court of Appeals makes a distinction between the decisions of this Honorable

* On July 21st, 1947, Mr. Justice Jackson of the United States Supreme Court also denied Mr. Woodward's motion for a stay.

Court in the case of *Esenwein v. Commonwealth of Pa., etc., supra*, and that of *Barber v. Barber*, 21 How. 582, is entirely erroneous.

The *Esenwein* case decides one point only and that is that the Nevada divorce obtained by Esenwein was invalid, void, because his purported domicile in Nevada was sham and a fraud on the Nevada Court and therefore the Nevada State Court had no jurisdiction to grant him the divorce, and so this Honorable Court affirmed the judgment of the Supreme Court of Pennsylvania, that the Nevada Court was without jurisdiction to grant Esenwein a divorce and it was therefore invalid to affect Mrs. Esenwein's support order. The decisions in the *Esenwein* case turned on the decision of this Honorable Court in the second *Williams* appeal, 325 U. S. 226, which was decided the same day the *Esenwein* case was decided, whereas the decisions of the Courts below as well as the Opinion of the New York Court of Appeals in the instant case, turn on the decision of this Honorable Court in the first *Williams* appeal, 317 U. S. 287.

The decisions of the above cited Federal Courts in a case, which is entirely similar to this *Estin* case and which support and follow the opinion of the New York Court of Appeals and also cite and follow the *Esenwein* case show the agreement in the thinking of those judges and the judges of the New York Court of Appeals about the *Esenwein* case.

The right of the respondent, Mrs. Estin to collect her alimony from the petitioner, her husband, is a contract right, the amounts stipulated in the separation agreement before referred to and which is the basis for the amount of alimony written into the Separation judgment, and

this contract right is not affected by Mr. Estin's Nevada divorce decree.

No power resides in the Court to alter a valid agreement as between the parties who made it and who may declare upon it for relief as upon any other contract.

Schnitzer v. Buerger, 236 App. Div. 625;
Hamlin v. Hamlin, 224 App. Div. 168.

The validity of the stipulation cannot be questioned and the court cannot make other provisions until the agreement is set aside by Court action for adequate reasons.

Braunsworth v. Braunsworth, 260 App. Div. 625;
Goldman v. Goldman, 282 N. Y. 296.

A judgment for alimony is a debt—and more than an ordinary one.

Barber v. Barber, 217 N. C. 422, 428.

The above cited decision of the North Carolina Supreme Court is the decision which was appealed from and affirmed by this Honorable Court in the heretofore cited case of *Barber, Stella v. Barber, George*, 323 U. S. 70, *supra*.

A judgment is the highest form of specialty. It is a debt.

The amount due to the plaintiff, respondent herein, is a judgment (arrears due on payments for support) and it is in the nature of a judgment debt for it is a sum which the court has directed the defendant to pay. It is a judgment which may be enforced by execution.

Thayer v. Thayer, 145 App. Div. 269;
Miller v. Miller, 7 Hun. 208.

The cases cited by petitioner's counsel in his brief on page 8 thereof do not support his contention that "alimony is

not a debt and are not at all in point.” In not one of the cases that he cites does the court hold that a judgment for alimony is not a debt. The cases cited by the petitioner’s counsel in his brief on page 6, that “the duty of a husband to support his wife terminates when the relation of husband and wife ends”, do not at all support his contention and are not in point. None of the cases cited in the petitioner’s brief support his claim for a Writ of Certiorari.

The statement on page 6 of petitioner’s brief in the fifth paragraph, “The only provisions in New York for such support (of ex-wife) are Section 1155 of the Civil Practice Act * * *, and Section 7.5 of the Domestic Relations law * * *,” is fallacious and not at all a correct statement of New York Statute law on the subject.

The authority and power of the New York Supreme Court to grant the Respondent, Mrs. Estin, a judgment for a Separation and alimony is given by Sections 1161 and 1164 of the Civil Practice Act.

Power and authority is given to the New York Supreme Court to grant permanent alimony in a final judgment to ex-wives, other than those divorced at their own suit, in Section 1140-a. The New York statutory law of divorce and alimony have nothing at all to do with the question at issue in this application.

The petitioner’s Nevada divorce is simply an incident which the overwhelming weight of authority holds does not affect or nullify Mrs. Estin’s prior New York judgment for separation and alimony, which is a property right.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari in this case should

be denied. The petition presents no question of merit to be adjudicated by this Honorable Court adversely to the respondent's contention, not only in cases directly in point and decisive of the issues here presented, but in other cases where the principles of law enunciated by this Honorable Court are controlling from other view points and such decisions are squarely adverse to the contentions of the petitioner.

Wherefore, respondent prays that the petition for a Writ of Certiorari be denied.

Dated New York, N. Y., July 28th, 1947.

Respectfully submitted,

ROY GUTHMAN,
Attorney for Respondent.

JOSEPH N. SCHULTZ,
of Counsel.

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IN THE
Supreme Court of the United States

October Term, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

**SUPPLEMENTAL BRIEF FOR RESPONDENT IN
OPPOSITION TO APPLICATION FOR A WRIT OF
CERTIORARI TO THE COURT OF APPEALS OF
THE STATE OF NEW YORK**

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✓
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IN THE
Supreme Court of the United States

October Term, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

**SUPPLEMENTAL BRIEF FOR RESPONDENT IN
OPPOSITION TO APPLICATION FOR A WRIT OF
CERTIORARI TO THE COURT OF APPEALS OF
THE STATE OF NEW YORK**

Statement

Statements of fact on page 2 of the Brief for Respondent, in Opposition to the Application for a Writ of Certiorari, herein, and on page 6 of the Petitioners Reply Brief, herein are incorrect. This requires a brief additional statement.

On page 2 of the Respondent's Brief, in the last paragraph, the date "in May 1924", appears.—This should be,—in May 1945.

On August 4, 1947, counsel wrote to the clerk of the Supreme Court of the United States calling attention to the alleged errors of statement and asked if he may have permis-

sion to file a short brief in answer to the Petitioner's Reply Brief. On August 6, 1947, the Clerk of the Supreme Court of the United States wrote to Respondent's Counsel: "I suggest that you prepare a supplemental brief containing any corrections concerning the facts in the case of *Estin v. Estin*, No. 139. October Term 1947."

On page 6 of the Petitioner's Reply Brief, Petitioner's Counsel writes, in discussing and seeking to distinguish the cases of *Durlacher v. Durlacher*, 123 Fed. 2nd 70, certiorari denied, 315 U. S. 805, and *Bassett v. Bassett*, 141 Fed. 2nd 954, Certiorari denied, 323 U. S. 718; "both Mr. Durlacher and Mr. Bassett who had obtained divorces in Nevada, sat still until suits were begun in the United States District Court in Nevada upon the money judgments obtained in New York."

Respondent's counsel deems the above quoted statement of fact to be erroneous, because Mr. Durlacher and Mr. Bassett, both of them, opposed their wives' Orders to Show Cause for Money Judgments, respectively, pursuant to Section 1171b of the New York Civil Practice Act, from the very inception of the proceedings, as appears in the reports of the case in Special Term of the New York Supreme Court, *Durlacher v. Durlacher*, 173 Misc. 339 and as appears in the Record on Appeal to the United States Circuit Court of Appeals, Ninth Circuit, in the case of *Bassett v. Bassett*. The decision of the Special Term of the New York Supreme Court (Kings County) granting Mrs. Bassett's motion for a money judgment was published in the New York Law Journal, March 26, 1941, Vol. 105, No. 70, page 1349, column 6. Not elsewhere published. In its decision in the *Bassett* case, the Court made reference to the *Durlacher* case.

Thus it appears in the printed and published reports and records of the cases that Messrs. Durlacher and Bassett were in just the same position in which Mr. Estin finds himself, and the distinction which petitioner's counsel seeks to make does not exist. The *Durlacher* and *Bassett* cases are parallel with the instant *Estin* case.

IN CONCLUSION

The Writ of Certiorari prayed for should be denied.

Dated, New York, N. Y., August 14, 1947.

Respectfully submitted,

ROY GUTHMAN,
Counsel for Respondent.

JOSEPH N. SCHULTZ,
of Counsel.

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IN THE
Supreme Court of the United States

October 1947 Term

No. 139

JOSEPH ESTIN,

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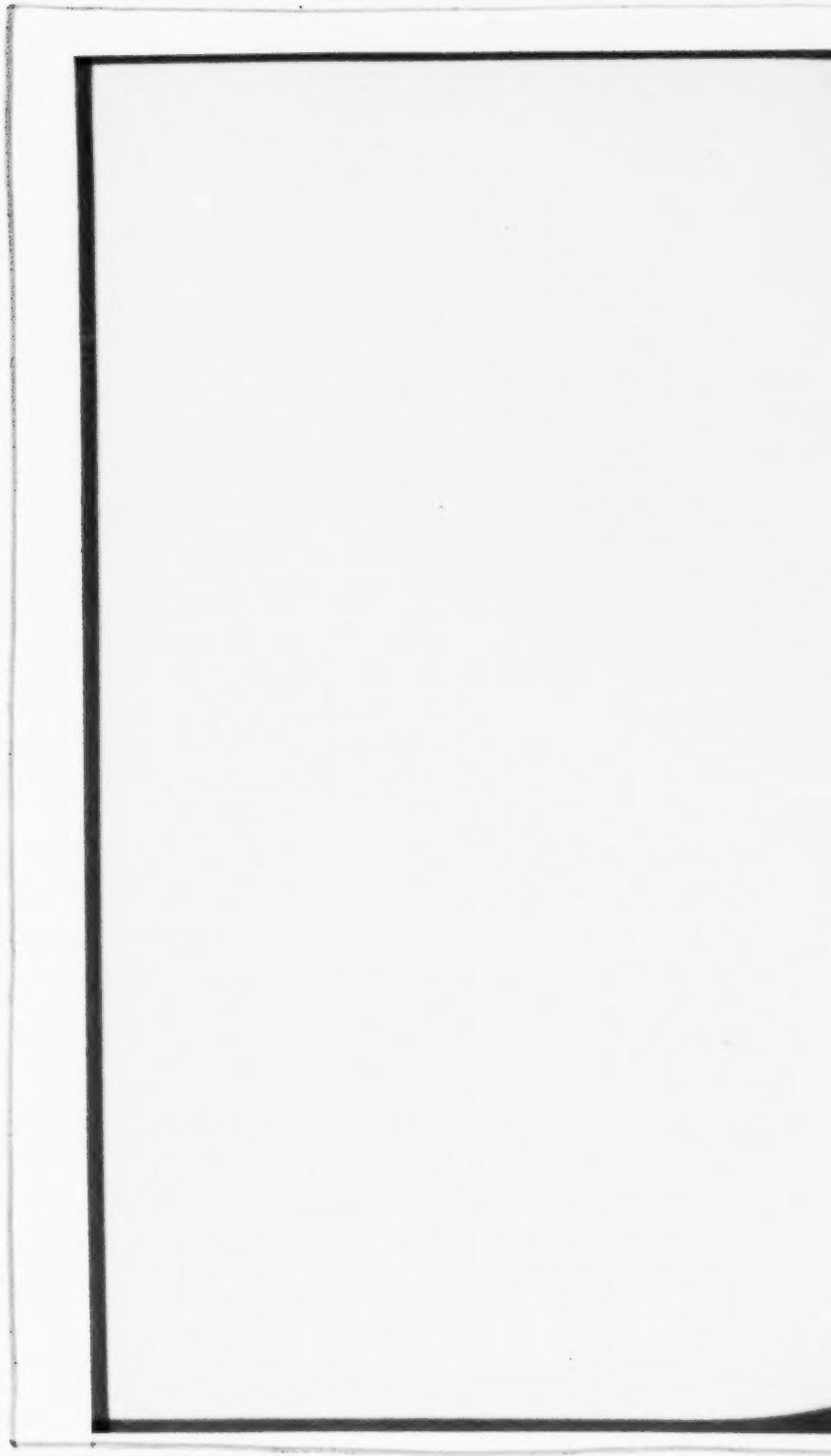
BRIEF FOR RESPONDENT

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Supreme Court of the United States

October 1947 Term

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

RESPONDENT'S BRIEF

Statement

This is an appeal by the Petitioner from an Order and judgment of the Court of Appeals of the State of New York (R. 96) and the judgment entered thereon in the Supreme Court in Queens County New York (R. 101), which unanimously affirms, Opinion by Loughran, Chief Justice (R. 97-R. 101), an Order and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department (R. 92-R. 93) which unanimously affirmed, without opinion, the re-settled Order and Judgment, appealed from, of the Supreme Court of the State of New York, Special Term Part I, in Queens County New York, Hon. James T. Hallinan, Justice, Presiding (R. 4-7) and the opinion of Justice Hallinan (R. 81-R. 91), which order of the Special Term pursuant to Section 1171b of the New York Civil Practice Act ascertains and fixes at the sum of \$2,421.90 together

with costs of \$20.00 allowed (R. 6), a total of \$2,441.90 (R. 7), the amount of arrears in payments for respondent's support and maintenance due from the Petitioner under a Judgment of Separation entered in said Supreme Court of New York, Queens County on October 13th, 1943 (R. 12-13) and Ordered that said Order be entered as a judgment (R. 6, R. 7) in the office of the County Clerk of Queens County, and further Ordered, that the motion on behalf of the defendant to modify the judgment of separation rendered in this Court so as to eliminate the provisions therein for the plaintiff's support is in all respects denied (R. 6); and which said Order and judgment entered thereon as directed, was entered in Queens County Clerk's office on July 9th, 1946 (R. 7) in the sum of \$2,441.90, which included arrears in payments for support at the rate of \$180.00 per month from May 1945 to and including June 1946, with interest, together with \$10.00 costs of each motion.

Facts

The plaintiff and defendant married at Crown Point, Indiana on July 20th, 1937 (R. 82, R. 48). The Petitioner and Respondent were husband and wife and lived together from the time of their marriage above stated until their separation on April 14th, 1942 (R. 49, R. 82) at 40-45 Hampton Street, Elmhurst, Queens County, New York. The respondent has continued to live in the City of New York ever since, but the Petitioner left New York City in November of 1943 (R. 77, R. 78).

The Respondent commenced an action for separation on February 5, 1943 upon the ground that defendant wilfully abandoned her (R. 81, R. 60) and on account of his cruel

and inhuman treatment of her because he openly kept company continuously and entertained a neighbor woman, and committed adultery with her (R. 60). The Petitioner was served personally with the summons and a copy of the complaint (R. 14, R.60). The Petitioner appeared generally by attorney who served and filed a notice of appearance on February 9, 1943 (R. 14, R. 61), but interposed no answer or otherwise contested the action (R. 81). By order of the Special Term of The Supreme Court dated May 3rd, 1943, the respondent's application for judgment was referred to an official referee to hear and report to the Court. Upon the inquest taken before the official referee on May 14, 1943, the attorney representing the Petitioner appeared in his behalf (R. 81). At the hearing before the official referee a contract and modified contract, also referred to as a stipulation, dated March 16th, 1943, as amended on April 1st, 1943, was introduced in evidence and received by the referee in evidence and marked Plaintiff's Exhibit I (R. 81, R. 82). The Official Referee in his findings of fact found that the said contract constitutes a separation agreement (R. 82). Copies of the Contracts and amendments are in the Transcript of Record, Exhibit B (R. 14), Exhibit B 1, (R. 18), Exhibit B 2 (R. 21), Exhibit C (R. 22).

On October 11th, 1943, at Special Term of The Supreme Court, on motion of the *defendant's* (Petitioner's) attorney, the Court signed the judgment, with notice of settlement, submitted by said attorney. Therein the report of the Official Referee was duly confirmed, ratified and approved in all respects and thus the said contracts B, B 1, and B 2 (R. 14-R. 21) between the parties was finally adjudicated to be a Separation Agreement and it was "adjudged that the plaintiff (respondent) Gertrude Estin, be and she hereby

is separated from the bed and board of the defendant (petitioner) Joseph Estin, because of the *wilful abandonment* of said plaintiff by said defendant and it is further ordered, adjudged and decreed that the defendant, Joseph Estin, pay to the plaintiff Gertrude Estin, for her support and maintenance the sum of \$180.00 per month." A copy of the said judgment is a part of the Transcript of Record herein. (Exhibit A annexed to affidavit of Gertrude Estin (R. 12).

The said judgment of the Supreme Court, Special Term, Queens County entered herein on October 13th, 1943 on motion of defendant's (petitioner's) attorney (R. 13) is the fixed, final determination of the rights of the parties. It was entered four years and four months ago and was not appealed from. No motion was made to change, amend or modify the judgment in any way until and except the motion made by the defendant (petitioner) on March 25th, 1946 to modify the said judgment (R. 67), which was denied by the Order (R. 6) appealed from herein.

Within a month after the entry of said judgment, Joseph Estin, the defendant, petitioner left New York, as aforesaid (R. 77, R. 78). The defendant (petitioner) paid for plaintiff's (respondent's) support and maintenance pursuant to the judgment of the Court and the separation agreement exhibits B, B 1, B 2 (R. 14-R. 21) until January 1944 and plaintiff (respondent) collected the amounts she has received thereunder as to \$1,250.00 thereof by collecting the security deposited as recited in the separation agreement Exhibit B etc. (R. 14 etc.), and the rest she has collected by making motions by way of Orders to Show Cause in the New York Supreme Court, Queens County, pursuant to Section 1171b of the Civil Practice Act (R. 9, R. 10).

In February 1944, Mitchell Salem Fisher, the defendant's (petitioner's) attorney of record and then attorney (R. 1) asked the plaintiff (respondent) and her attorney to come to his office to discuss a possible settlement of the differences between the plaintiff (respondent) and the defendant (petitioner) (R. 64, R. 65, R. 76). The statements of defendant's attorney (Mitchell Salem Fisher, Esq.) in the course of defendant's business are the statements of the defendant himself. Mr. Fisher stated at the time as the above references show, that the defendant Joseph Estin went to Nevada in January 1944 for the purpose of suing for divorce. The defendant (petitioner) naively refers to the above negotiations between his attorney, Mitchell Salem Fisher and his wife the respondent herein and confirms that Mr. Fisher was acting pursuant to Joseph Estin's instructions (R. 26).

The Separation Agreement, contract, entered into between the parties hereto on March 16th, 1943, and amended by contract dated April 1st, 1943, and amended further by a letter dated April 12th, 1943, was signed by each of the parties and by their then attorneys (R. 1) and duly acknowledged by the parties before a Notary Public (R. 17, R. 20, R. 21, R. 22). The consideration for this Separation Agreement from the plaintiff (respondent) to the defendant (petitioner) was a separate, distinct and valuable consideration, entirely separate and apart from their marital relations and the defendant's (petitioner's) obligation to support his wife. The consideration was the refraining on the part of the plaintiff (respondent) and her then attorney (R. 1) from introducing any evidence at all of the defendant's (petitioner's) misconduct with a neighbor woman as alleged in the complaint (R. 60, R. 61).

The defendant (petitioner) Joseph Estin obtained a judgment of absolute divorce from the plaintiff (respondent) in Reno, Nevada, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on May 24th, 1945 (R. 40) on the ground of three years' continual separation without cohabitation.

In the two cases, the action for a separation by Gertrude Estin against Joseph Estin in Queens County, New York, in October 1943, and in the action for divorce by Joseph Estin against Gertrude Estin in Reno, Nevada in May, 1945, the parties are identical, Gertrude Estin and Joseph Estin; their character in the two cases is identical, spouses engaged in marital litigation; Mrs. Estin, the wife, was the plaintiff in the first action and Mr. Estin, the husband was the plaintiff in the second action; the issues in the two cases are identical, their marital status, their separation, whether it is termed separation, wilful abandonment, or living apart, is the same thing and was proved by identical testimony in both cases. The testimony is identical in both cases.

Both Mrs. Estin and Mr. Estin, one in New York first and the other in Reno, Nevada, eighteen months later testified they were married in Crown Point, Indiana on July 20th, 1937 (Mrs. Estin, R. 82, Mr. Estin, R. 48); that they lived together in New York City from that time until April 14th, 1942, when Mr. Estin left Mrs. Estin and their common home with the intention of not returning (Mrs. Estin, R. 81, R. 82, Mr. Estin, R. 48, R. 49). The only other testimony in the New York action was the introduction in evidence of the Separation Agreement (Plaintiff's Exhibit I, R. 82). In the Reno, Nevada divorce action there was considerable more evidence introduced, but it

related altogether to Mr. Estin's movements and residence after the date of the New York judgment and after he arrived in Nevada and was relevant only to prove his domicile in Nevada.

The time from April 14th, 1942, to October 11th, 1943, is eighteen months, the span of living apart which was found to be wilful abandonment in the New York Separation Action. Then their separation became legal by judgment of a court of competent jurisdiction. The time from October 13th, 1942 to May 24th, 1943 is eighteen months. Together makes the total of three years' "continual separation" which the Nevada Court adjudged was sufficient for it to grant the judgment of divorce. From October 13th, 1943 until May 24th, 1945 the "continual separation" by Mr. and Mrs. Estin was a legal separation decreed by the New York Supreme Court and could not be the grounds or part of the grounds for the Nevada divorce action. The Nevada Court is bound to give the same full faith and credit to the judgment of separation of the New York Supreme Court as the petitioner demands for the judgment of the Nevada Court.

Mrs. Gertrude Estin was not personally served with the summons and complaint in Nevada in her husband's divorce action in Nevada (R. 33, R. 34, R. 35). She did not appear in the action personally or by attorney (R. 37). Mr. Joseph Estin was personally served with the summons and complaint in his wife's separation action in Queens County, New York, on February 5th, 1942 (R. 14), and a certified copy of the Judgment of the New York Court (R. 12) was personally served on the defendant in the action, petitioner here, Joseph Estin, on October 27th, 1943

at New York, New York (R. 13, R. 14). The petitioner, Joseph Estin, defendant in the action, appeared by attorney and took part in his wife's separation proceedings in Queens County, New York (R. 12, R. 13, R. 81, R. 82).

Argument

The domicile of the Petitioner in 1944 and 1945 or at any other time and the good or bad faith of that domicile has nothing at all to do with the question at issue here and the points of law to be resolved.

There are four points to this case and this appeal and the decision of any one of them favorably to the respondent, independently of the other three, would determine an affirmance of the judgment of the Court of Appeals of the State of New York. They are:

I. Assuming for the purpose of this argument only, that the Nevada divorce obtained by the petitioner in May 1945, *ex parte*, *in rem*, by default, from his wife, the respondent, is valid to dissolve the marriage relation, does it, nevertheless, being a judgment by default, *in rem*, upon constructive service and not *in personam*, have the power to cut off vested interests of the respondent to collect \$180.00 per month from the petitioner under the judgment of separation herein or under the separation agreement and are not those interests vested?

II. Did that Reno, Nevada, divorce judgment, *ipso facto*, supersede and nullify the judgment of the Supreme Court in Queens County, New York, of separation and allowance for support, entered on October 13th, 1943, or

must its validity in New York be first established by a Court of Competent jurisdiction in New York in an action brought to establish its validity, and has its validity been so established?

III. Is the judgment and decree of divorce of the parties hereto on May 24th, 1945 by the District Court of Washoe County, Nevada void because in violation of the Constitution of the United States, Article IV, Section 1? Was the District Court in Washoe County, Nevada, barred by the "full faith and credit" clause, Article IV, Section 1 of the Constitution of the United States from hearing and determining and rendering the judgment of divorce of the parties?

IV. Did the judgment of divorce which the petitioner obtained in Reno, Nevada, in May 1945, in an action in which his wife, the respondent, was not personally served with process within the jurisdiction of the Nevada Court and in which she did not appear in person or by attorney, impair the obligation of the adjudicated separation agreement between her husband, the petitioner, and herself (R. 82, R. 14, R. 18, R. 21, R. 12)?

Justice Hallinan, sitting in Special Term Part I of the Supreme Court in his decision in this case appears to have decided Points I, II and IV favorably to the respondent and gave her the money judgment appealed from (R. 67). As to Point III, Justice Hallinan writes (R. 86): "The plaintiff (respondent) urges however, that the separation judgment rendered by this court was an absolute bar to the District Court of Nevada assuming jurisdiction over the matrimonial res of the parties and rendering a judg-

ment of divorce against her, in the absence of her appearance therein. There is much that can be said for this view," and again (R. 89): "It does not necessarily follow that the divorce obtained by the husband in Nevada, jurisdictionally efficacious to dissolve the marital status of the parties, has extra-territorial effect upon the provisions for the maintenance and support contained in a pre-existing separation decree of this court, which is entitled equally with the decree of the Court in the State of Nevada, to the protection of the full faith and credit clause of the federal constitution."

The petitioner in his counsel's brief begs the question in this appeal when he states on page 4 of his brief:

2. "The divorce decree obtained by the petitioner in the Nevada Court was recognized as valid by the New York Court and terminated the status of petitioner as husband and wife."

Nowhere in the record is there any statement that the validity of the Nevada divorce decree has been adjudicated by any Court or judge or justice. Justice Hallinan in Special Term writes (R. 88, 89): "Assuming for the purposes of this discussion only, that the provisions of the stipulations referred so far as adopted in the findings of this Court, merged in its decree, it does not necessarily follow that the divorce obtained by the husband in Nevada, jurisdictionally efficacious to dissolve the marital status, has extra-territorial effect upon the provisions for the maintenance and support contained in the pre-existing separation decree of this Court which is entitled equally with the decree of the State of Nevada to the protection of

the full faith and credit clause of the federal constitution."

The Appellate Division of the Supreme Court, Second Department, unanimously affirmed without opinion the Order of Special Term of the Supreme Court (R. 92, R. 93) thereby affirming and making its own, Justice Hallinan's opinion.

The New York Court of Appeals, in its opinion (R. 98, R. 99) did not pronounce the Nevada Divorce valid. In his opinion Chief Judge Loughran writes: "We have then this situation: the full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage etc." The New York Courts gave full faith and credit to the May 24th, 1945 judgment of divorce of the Nevada Court granted to the Petitioner herein.

The question of "full faith and credit" under the United States Constitution, in fact, the Nevada judgment itself, was not before the Court at Special Term.

"Section 1 of Article IV of the Constitution of the United States does not make a sister state judgment a judgment in another state. To give it the force of a judgment in another state it must be made a judgment there."

Williams v. North Carolina, 2nd Appeal, 325
U. S. 226, 229.

In addition to the above, in the State of New York there are several decisions that until a divorce decree of another state has been validated in a court of competent

jurisdiction in New York State, such decree is not entitled to full faith and credit.

Gibson v. Gibson, 2nd Appeal, 266 App. Div. 975;

Canle v. Canle, 58 N. Y. S. 2nd 168;

Gewirtz v. Gewirtz, 189 App. Div. 485;

McCarthy v. McCarthy, 179 Misc. 623;

Jiranek v. Jiranek, 179 Misc. 502.

As here presented upon exhibits attached (R. 30-R. 58) to affidavits in opposition to an order to show cause pursuant to Section 1171b of the New York Civil Practice Act and upon exhibits (R. 73, R. 74) annexed to a motion, the Court is asked to accept the decree of a Nevada State Court and give it effect to supersede and nullify a prior decree or judgment of the Supreme Court of New York.

POINT I

In New York the right to alimony and support by a wife separated from her husband is entirely statutory.

There is no common law of divorce, separation or alimony in New York State: they are wholly statutory.

Borenstein v. Borenstein, 270 N. Y. Sup. 688, judgment affirmed 272 N. Y. 407.

Aside from the statute no New York Court has power to decree an absolute divorce or a separation and alimony. Neither the Common Law Courts nor the Court of Chancery in England have ever possessed that power. Hence the courts here never succeeded to it. They can exercise

no power on the subject of divorce except what is expressly specified in the statute.

Peuguet v. Phelps, 48 Barb. 566;
Galusha v. Galusha, 43 Hun. 181;
Erkenbrach v. Erkenbrach, 96 N. Y. 456;
Romaine v. Chauncey, 129 N. Y. 566, 571;
Cotter v. Cotter (1906), 225 Fed. 471.

The citation by the petitioner's counsel on page 8 of his brief of the case of *Romaine v. Chauncey* (*supra*), 129 N. Y. 566, points the fallacy of petitioner's argument and the cases his counsel cites in his brief. The case cited, *Romaine v. Chauncey*, is not at all in point. The court in that case decided that alimony is a debt but a special kind of debt which cannot be reached by the wife's creditors in proceedings supplementary to execution by a receiver to take payments by the husband on account of alimony to satisfy a judgment of the wife's judgment creditor. By applying the principle of *ad hoc* interpretation to the quotations from decisions of the Courts cited by Petitioner's counsel it is at once apparent that the cases he cites do not support his contention in this appeal. The case of *Audubon v. Shufeldt*, 181 U. S. 575 which he cites on page 9 of his brief is closely analogous to the above cited case of *Chauncey v. Romaine*, 129 N. Y. 566. The *Audubon v. Shufeldt* case was a bankruptcy case which held that a judgment for alimony is a debt but not the kind of debt which can be proved in bankruptcy and it is not discharged by husband's discharge in bankruptcy.

As a matter of fact the amount of support and maintenance granted to the respondent *Gertrude Estin* in the

Separation Judgment of October 13th, 1943 was fixed by the official referee and the Court (R. 88, R. 13) on account of the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. So the respondent's right to receive alimony in this case does not arise from domestic relations or any common law obligations of her husband.

The judgment appealed from herein is the money judgment for \$2,441.90 entered herein in the County Clerk's office of Queens County New York on August 12th, 1946 (R. 4, R. 5, R. 6, R. 7) which the New York Court of Appeals in its opinion (R. 98) pronounced to be "a new final judgment". On its face it is final and unconditional.

The judgment of separation and making an allowance to the respondent herein, of October 13th, 1943 is absolute and unconditional on its face. The main feature of the judgment was the separation, the award for maintenance and support is only incidental and ancillary thereto, as is pointed out on page 11 of the Petitioner's brief. The separation judgment can be modified only by the Court which granted it and then only in the manner provided by Section 1165 of the New York Civil Practice Act, which provides that both spouses may jointly apply to the Court to annul the separation judgment, a procedure which is clearly analagous to two divorced spouses remarrying.

Upon the proof of extraneous facts as to a change for the worse in his financial condition a husband may apply to the Court which granted the separation judgment to modify the payments of alimony downward, which is the ancillary part of the judgment.

POINT II

The separation judgment and award for maintenance and support of October 13th, 1943 is absolute on its face and no power exists to modify it except as conferred by statute.

The settled doctrine in New York is that no power exists to modify a judgment for alimony absolute in terms except as conferred by statute (Sec. 1165, Civ. Prac. Act) and a judgment for future alimony is absolute on its face until modified by the Court rendering it. Such a judgment as to past due instalments falls under the general rule that it is entitled to full faith and credit in the Courts of another state.

Sistare v. Sistare, 218 U. S. 1,

Barber, Stella v. Barber, George, 323 U. S. 77.

The separation decree continues in full force and effect so long as no order revoking the decree was made pursuant to Section 1767 of the Code of Civil Procedure (now Sec. 1165 Civil Pr. Act) which section provides the exclusive method of revoking or terminating a decree of separation.

It is the settled law of this state (New York) that the only method by which a decree of separation can be revoked is that prescribed by Sec. 1767 of the Code of Civil Procedure (now 1165 Civ. Pr. Act) and the only method by which it can be annulled is that set forth in Section 1771, Code of Civil Procedure (now 1170 Civ. Pr. Act) and in each instance it can be done only by the Court.

Gewirtz v. Gewirtz, 189 A. D. 485,

Bartenbach v. Bartenbach, 271 A. D. 799.

The judgment of October 13th, 1943 for separation and for the support and maintenance was absolute and fixed the rights of the parties, it was in no way discretionary. When the motion to give a money judgment for the accumulated arrears in payments for support and maintenance was made, the Justice in Special Term had no discretion but to give judgment for the amount he would find to be due. The right conferred by the New York Civil Practice Act to modify a Separation judgment for a husband under obligation to pay alimony, upon a change in his financial condition, is upon the proof of extraneous facts as provided in the Act. If he proves the facts the Justice is bound to modify the judgment as to the amount of alimony to the extent that the proof shows should be done. The Justice has no discretion.

In the present case where the amount of alimony was fixed by the Court adopting the amount fixed by the parties' separation agreement (R. 88) there certainly was no discretion given to any Court which would later be called on to pass on the question.

The validity of an agreement for support cannot be questioned until and unless it is set aside or brought up for review in a court of competent jurisdiction.

Braunsworth v. Braunsworth, 260 App. Div. 113;

Goldman v. Goldman, 282 N. Y. 296;

Brice v. Brice, 225 App. Div. 453;

Jackson v. Jackson, 290 N. Y. 512.

In the case of *Barber v. Barber*, 217 N. C. 422 the Court in its opinion wrote:

"The orders made from time to time are of course, *res judicata* between the parties, subject to the power of this court to modify them. The con-

solidation of the amounts due, when ascertained in one order or decree does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of the summons, he is in court only for such orders as upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one.”

The defendant being a party to the action and being given due notice of the motion, is bound by such decree, and the plaintiff is entitled by law to all of the remedies provided by law for the enforcement thereof.

Vaughan v. Vaughan, 211 N. C. 354.

A subsequent decree of divorce on constructive service does not end husband's obligation under or the enforceability of prior decree for separate maintenance of wife and minor children, where the separate maintenance decree was not modified by court action.

Simonton v. Simonton, 40 Idaho 751, 42 A. L. R. 1463, 1475.

A decree of a Washington State Court granting a divorce and awarding alimony payable in future instalments constitutes proper basis for a suit in another jurisdiction (Alaska) under the full “faith and credit” clause of the federal constitution, as to instalments past due.

Cotter v. Cotter, 225 Fed. Rep. 475.

In the opinion in the above cited case of *Cotter v. Cotter*, the cases of *Israel v. Israel*, 148 Fed. Rep. 576 (C. C. A. 3),

Lynde v. Lynde, 181 U. S. 183 and *Sistare v. Sistare*, 218 U. S. 1 are cited.

Upon the proof of the proper and necessary facts a Court of Equity has jurisdiction to modify any kind of judgment. Freeman on Law of Judgments, vol. 3.

That any judgment may be modified by a court of competent jurisdiction upon the proof of extraneous facts does not make any judgment conditional.

Article IV, Section 1, of the United States Constitution does not mention final judgments, or conditional judgments. It commands that the courts of every state shall give "full faith and credit" to the judgments of the courts of every other state, and the act of Congress implementing the section of the Constitution commands that the courts of each state and of the United States shall give to the judgments of the courts of the other states such "full faith and credit" as the judgment has in the courts of the state in which it is given.

The decision of the Honorable, the Supreme Court of the United States in two late cases:

Atkins v. Atkins, 326 U. S. 683 (1946);

Griffin v. Griffin, 327 U. S. 220 (1946).

does not change the effect of the above-cited cases or alter the effect of well established principles of law on the *Estin* case.

In the *Atkins* case which in its facts and principle of law is very similar to the case of *Esenwein v. Commonwealth*, 325 U. S. 279, the only question at issue was whether Mr. Atkins' Nevada divorce was valid because his domicile there

had been bona fide and thus gave the Nevada Court jurisdiction to grant the divorce. The Illinois courts had held that his domicile in Nevada was a sham and fraudulent on the Nevada Court and therefore the Nevada Court was without jurisdiction and his Nevada divorce therefore invalid. The United States Supreme Court vacated the decision of the Illinois Supreme Court and remanded the case to be retried in consideration of certain cases which it cited. The effect of an *ex parte* Nevada divorce on a prior judgment of the Circuit Court of Lincoln County, Illinois, was not in the case. In fact, Mr. Atkins' divorce judgment pre-dated Mrs. Atkins' separation action.

In the *Griffin* case, Mrs. Griffin had two Orders of Special Term of the Supreme Court of the State of New York to docket as judgments, arrears of alimony granted her in a prior action for a Separation and support in New York. The first motion was on notice to Mr. Griffin. He appeared in the New York Court and opposed the motion. Mrs. Griffin prevailed and the amount of arrears of alimony was computed and ordered docketed and paid. This was in 1935. In 1938 Mrs. Griffin made another motion for arrears which had accumulated since her 1935 motion. No notice of the second motion was given Mr. Griffin and he did not appear to contest it. It was granted *ex parte*. Mrs. Griffin then sued for the total of both amounts of arrears, over \$3,000.00 in the United States District Court for the District of Columbia, where Mr. Griffin resided, and the District Court gave judgment for the full amount sued for to Mrs. Griffin. Mr. Griffin appealed to the Supreme Court of the United States, which reversed and modified the judgment of the United States District Court, letting Mrs. Griffin have judg-

ment for the amount of arrears up to the date of her order of 1935 but disallowing the amount of arrears adjudged due her in the Order of 1938 on the grounds that the New York Supreme Court order in 1938 was not due process of law because Mr. Griffin had not been served with notice of motion.

Mrs. Griffin with her order of 1935 was in a position similar to that of Mrs. Estin in the present case. There was due process of law there because Mr. Griffin appeared and contested the proceeding. In this case Mr. Estin was served with notice of the Order to Show Cause dated February 20th, 1946 (R. 8) and appeared in Court by attorney and contested the Order to Show Cause (R. 23). Section 1171b of the New York Civil Practice Act, pursuant to which the Order to Show Cause commencing these instant proceedings were commenced, had not been enacted when Mrs. Griffin made her motions in 1935 and 1938 respectively. The constitutionality and due process of law in proceedings pursuant to Section 1171b of the New York Civil Practice Act has been affirmatively passed upon. *Durlacher v. Durlacher*, 173 Misc. 329.

In allowing Mrs. Griffin to have judgment for the amount of her arrears up to 1935, the United States Supreme Court followed its decisions in *Sistare v. Sistare*, 218 U. S. 1 and in *Barber, Stella v. Barber, George*, 323 U. S. 77.

In this instant proceeding there has always been due process of law. The orders to show cause have always been served on petitioner's attorney-in-fact (R. 17) and attorney of record (R. 1) in this instant case (R. 66) and always brought about on an appearance by the petitioner, by attorney.

POINT III

The judgment of divorce granted to the petitioner in Reno, Nevada on May 24th, 1945, *ex parte* and by default, *in rem*, had no effect on the separation judgment and the award for the respondent's support and maintenance, of the New York Supreme Court of October 13th, 1943.

Durlacher v. Durlacher, 123 Fed. 2nd, 70 cert. den. 315 U. S. 805 1941 (CCA 9th);

Bassett v. Bassett, 141 Fed. 2nd 954, cert. den. 323 U. S. 718 (1944 CCA 9th);

Barber v. Barber, 323 U. S. 77.

The facts in the *Durlacher* case are briefly as follows:

The Durlachers lived and were married in Westchester County, New York; differences arose between them and they separated. Mrs. Durlacher brought action in the Supreme Court in Westchester County for separation and support and maintenance. Durlacher was personally served with the summons and complaint in New York State. The case was tried and judgment was given to Mrs. Durlacher for separation, and decreeing her prescribed monthly amounts which the defendant was ordered to pay her for her support and maintenance. Thereafter Mr. Durlacher went to Nevada and stayed there long enough to acquire a "residence" as required by the Nevada statute and commenced an action for divorce there against his wife, in New York. Service on Mrs. Durlacher was by constructive service. She was not in Nevada, was not served with process in Nevada and did not appear in the divorce action either in

person or by attorney. The Nevada State Court granted Mr. Durlacher an absolute divorce from his wife. Thereafter Mrs. Durlacher applied by way of an order to show cause for an Order to be entered as a judgment for arrears in the payments due her for support and maintenance under her judgment of separation in Westchester County pursuant to Section 1171b of the Civil Practice Act (*Durlacher v. Durlacher*, 173 Misc. 329). Mr. Durlacher appeared in New York and contested the motion for a money judgment. Mrs. Durlacher prevailed and a money judgment for the amount of the arrears was awarded her. She afterwards obtained two more Orders for money judgments. The amount of the three money judgments then being over \$3,000.00 she sent them out to Reno, Nevada to be sued on there in the United States District Court for the District of Nevada, and collected.

The United States District Court permitted recovery of the first two money judgments which were for arrears which had accumulated up to the date of Mr. Durlacher's Nevada divorce decree, but held that the recovery of the third was barred by the Nevada divorce decree. The United States District Court dismissed Mrs. Durlacher's action on the third money judgment on the grounds that the divorce granted to Mr. Durlacher in Nevada superseded the New York separation judgment and put an end to his matrimonial liabilities, and that to enforce the New Judgment was repugnant to the law of Nevada and that the law of Nevada was the law which the District Court should regard and enforce (*Durlacher v. Durlacher*, 35 Fed. Supp. 1005). Mrs. Durlacher appealed to the United States Circuit Court of Appeals, Ninth Circuit, which reversed and remanded the above judgment of the United

States District Court. The opinion of the United States Circuit Court of Appeals states:

"Since the New York Supreme Court had acquired and retained jurisdiction in personam over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated.

Nevertheless in New York, Simon could have brought a suit in which he would have been entitled to show that the Court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in that maintenance proceeding. However he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the lack of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that State. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction.

Simond contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada Law was claimed to be that upon the dissolution of the marital tie the court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. That is to say, the Nevada

Federal Court could refuse to recognize the New York judgment because repugnant to Nevada Law.

The Supreme Court has repeatedly held that under the "full faith and credit" clause of the Constitution (extended by the statute to the Court below) a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the State requested to enforce it."

The above decision was followed and reaffirmed by the same Court on substantially the same facts in the later case of *Bassett v. Bassett*, 141 Fed. 2nd 954 (C. C. A. 9th, 1944) cert. den. 323 U. S. 718 (1944).

The facts in the case of *Bassett v. Bassett* (*supra*), are exactly similar to the facts in the *Durlacher* case (*supra*) and to the *Estin* case under consideration.

Mr. and Mrs. Bassett lived in Nassau County, New York. They had a family of minor children. They disagreed and separated. Mrs. Bassett in 1934 commenced an action for a separation in the Supreme Court in Nassau County, and was given a judgment and was granted a decree for money for the support of herself and children payable monthly. Mr. Bassett went to Nevada but apparently not for the purpose of getting a divorce. He bought a ranch and went into business there and paid taxes and voted. He did not commence his divorce action until he had lived in Nevada four or five years. Apparently Mr. Bassett sent payments due under the separation decree in the New York Court after he went to Nevada. When he stopped making payments, Mrs. Bassett applied to the Supreme Court of New York, Nassau County, for a money judgment for the amount of arrears pursuant to section 1171b of

the New York Civil Practice Act and an Order was entered as a judgment for the amount of arrears then due. Mrs. Bassett did not proceed to collect this judgment but waited and later obtained a second Order entered as a judgment in the same kind of proceeding for arrears in payments of money for her support from the date of her first judgment to the date of her second judgment. The amount of the two judgments entered was over \$3,000.00, the amount required to give to the United States District Court jurisdiction and both judgments were sent to Reno and an action started in the United States District Court for the District of Nevada against Mr. Bassett for the amount due on both judgments.

After the entry of Mrs. Bassett's first judgment for arrears, in New York, Mr. Bassett commenced an action for divorce in Nevada against his wife in New York. Mrs. Bassett was served with the summons and complaint by publication and by mail. She was not in Nevada, was not served with process personally in Nevada, and did not appear in the case either in person or by attorney and Mr. Bassett obtained a judgment of divorce by default after a hearing as required by the Nevada Statute. The divorce decree gave Mr. Bassett an absolute divorce, freed him from the bonds of matrimony, gave him the custody of the minor children, and freed him from any and all obligations to pay his wife any money for her support and maintenance as provided in the New York judgment in the separation action. It was after the entry of divorce in the Nevada State District Court that Mrs. Bassett obtained her second Order entered as a judgment for arrears of payments due for her support and maintenance.

In the action in the District Court of the United States for the District of Nevada on her money

judgments for arrears, the United States District Court gave Mrs. Bassett judgment for the amount of her first judgment for arrears, up to the time her husband obtained his divorce and refused to give her judgment for the amount of her second New York judgment on the ground that the judgment was for amounts which became due after the date of the Nevada divorce judgment which put an end to Mr. Bassett's matrimonial obligations including his liability to make payments as required by the New York judgment.

Bassett v. Bassett, 51 Fed. Supp. 545.

Mrs. Bassett appealed to the United States Circuit Court of Appeals, Ninth Circuit, which overruled and reversed the judgment of the United States District Court for the District of Nevada and remanded the case and directed that Mrs. Bassett be given judgment for the full amount of both of her judgments. The United States Circuit Court of Appeals based its decision on the case of *Durlacher v. Durlacher* (*supra*) which it had decided but a few months previously.

In its decision the Court writes:

"Where the New York Court in a wife's separate maintenance action acquired jurisdiction over both husband and wife, the Nevada State Court had no jurisdiction in husband's subsequent divorce action to relieve husband of his obligation under judgment in separate maintenance action and hence Nevada divorce decree was not a bar to wife's action in the Nevada Federal District Court against husband on New York judgments which wife obtained for accrued alimony, after the divorce decree."

The *Bassett* case was decided in 1944 after the decision by the Supreme Court of the United States of the first appeal in the case of *Williams v. North Carolina*, 317 U. S. 287. Mr. Bassett argued that since he had a bona fide domicile in Nevada his default divorce was entitled to "full faith and credit" under *Williams v. North Carolina* (*supra*), decided a year earlier, and hence his decree barred recovery under the separation agreement. On deciding this question the United States Circuit Court of Appeals in its decision writes further:

"In the case of *Durlacher v. Durlacher*, 123 Fed. 2nd 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of a Court in another state. Counsel argue that the *Durlacher* case was decided upon the theory of *Haddock v. Haddock*, 201 U. S. 562, that the *Haddock* case was reversed by *Williams v. North Carolina*, 317 U. S. 287, and therefore the *Durlacher* case is not a precedent upon which a decision in the instant case can be rested.

We believe that the *Williams* case does not affect the result reached in the *Durlacher* case. The State of New York had acquired jurisdiction over both parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned herein. In those proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the orig-

inal decree and been unsuccessful, his recourse would have been in the appellate courts of New York and in the Supreme Court of the United States.

As here presented we are asked to accept the decree of a Nevada Court which, in effect, attempts to set aside decrees or judgment of a court of New York. This is the point in this appeal and, *Williams v. North Carolina (supra)* has absolutely nothing to do with it."

The refusal of the United States Supreme Court to review the above decision is significant and would seem clearly to indicate agreement with the reasoning of the U. S. Circuit Court of Appeals.

In the history of the above cited cases of *Durlacher v. Durlacher*, 123 Fed. 2nd 70 and *Bassett v. Bassett*, 141 Fed. 2nd 954, it appears, conclusively, that *Simon Durlacher* and *William I. Bassett*, both of them, opposed their wives' Orders to Show Cause for Money Judgments, respectively, pursuant to Section 1171b of the New York Civil Practice Act, from the very inception of the proceedings in each case, as appears in the reports of the case in Special Term of the New York Supreme Court, *Durlacher v. Durlacher*, 173 Misc. 329 (1840) and as appears in the Record on Appeal to the United States Circuit Court of Appeals, Ninth Circuit, in the case of *Bassett v. Bassett*, 141 Fed. 2nd 954 (1944). The decision of Special Term of the New York Supreme Court (Kings County), granting Mrs. Bassett's motion for a money judgment was published in the New York Law Journal, March 26, 1941, Vol. 105, No. 70, page 1349, column 6. Not elsewhere published. In its decision in the *Bassett* case, the Court referred to the *Durlacher* case.

Thus it appears in the printed and published reports and records of the cases, that *Messrs. Durlacher and Bassett* were in just the same position in which Mr. Estin finds himself. The *Durlacher* and *Bassett* cases are parallel with the instant *Estin* case.

As here presented, on an exhibit attached to affidavits annexed to a motion (R. 73) and annexed to affidavits (R. 30, R. 58) in opposition to the Order to Show Cause herein pursuant to Section 1171b of the New York Civil Act, the Court is asked to accept the decree of a Nevada State Court, which did not have personal jurisdiction of the defendant there, respondent here, because she was not in Nevada and was not personally served with the summons and complaint, within the jurisdiction of the Court, and give to that decree effect to supercede and nullify a prior judgment of the Supreme Court of New York, of which the Nevada Court had notice in the pleadings in the case before it. After a trial of the same facts between the same parties on the same issues, the New York Court gave the wife a separation and support, the Nevada Court gave the husband a divorce eighteen months later. This is the point in this appeal and domicile has nothing to do with it. The decisions in both appeals of *Williams v. North Carolina*, 317 U. S. 287 and 325 U. S. 226 do not apply. The *Williams* case was a criminal case and this Honorable Court in that case was not considering and did not pass on the possible effect of Mr. Williams' and Mrs. Hendrix' Nevada divorces on prior judgments in a matrimonial case or cases in the State of North Carolina.

The application for a writ of certiorari in the above case of *Bassett v. Bassett* was denied in October 1944. Two

months later, in December 1944, the United States Supreme Court decided the case of *Barber v. Barber*, 323 U. S. 77, *supra*, in which identical facts and circumstances were in issue.

In deciding the above *Barber* case the United States Supreme Court held:

“A money judgment of a court of North Carolina for arrears of alimony, not by its terms conditional and on which execution was directed to issue, held, under the law of that State, not subject to modification or recall; and under the Federal Constitution and the Act of May 26th, 1790, as amended entitled to full faith and credit.”

In its decision of the above case of *Barber v. Barber*, this Honorable Court cited and followed the same cases and precedents as were cited and followed in the *Durlacher* and *Bassett* cases and in the briefs and decisions of the Courts below in the instant case under consideration. Constant iteration and reiteration of the same law and cases is not called for every time such a matrimonial action is carried to the Court of Last Resort of a state. No different or novel aspect of the problem is presented by the petitioner here.

See also, Pennoyer v. Neff, 95 U. S. 714.

POINT IV

Mrs. Estin's right under the New York Statute to have a money judgment for the past due instalments due to her for support and maintenance is a right of property which cannot be taken from her except by due process of law.

Barber v. Barber, 21 How. 582.

"Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as is in any other judgment for money."

Lynde v. Lynde, 181 U. S. 183 (1898);

Sistare v. Sistare, 218 U. S. 1 (1909).

The respondent has vested property rights to the alimony awarded by her separation judgment as to past due instalments.

Livingston v. Livingston, 173 N. Y. 377 (1903);

Hayes v. Hayes, 220 N. Y. 596 (1917);

Harris v. Harris, 259 N. Y. 334, 337 (1932);

Karlin v. Karlin, 280 N. Y. 32 (1939);

Waddy v. Waddy, 290 N. Y. 251 (1943);

Krauss v. Krauss, 127 A. D. 740 (1908).

The dates of the above cited cases show that the "Vested Interest" doctrine, as Petitioner's counsel terms it on page 18 of his brief, is old and not new and has not arisen in New York State since the first decision by this Honorable Court in *Williams v. North Carolina*, 317 U. S. 287, *supra*.

POINT V

The contract entered into by and between Joseph Estin, the petitioner and his wife, Gertrude Estin on March 16th, 1943, modified by contract dated April 1st, 1943 and further modified by letter dated April 12th, 1943, which had been adjudicated a separation agreement is still a legal, valid, binding and existing contract between them and its obligation is not impaired by the divorce judgment given to Joseph Estin in Nevada on May 24th, 1945.

The argument by Petitioner's counsel on page 38 of his brief that the separation agreement was a mere temporary stipulation to guide the Court, is specious.

A study of the contract (R. 14-R. 22) shows that it was carefully prepared by the parties and their then lawyers (R. 1). They took four weeks, from March 16th, 1943 to and including April 12th, 1943 and three separate writings to make their contract. The intermediate contract of modification dated April 1st, 1943, reaffirmed (R. 20) the first contract dated March 16th, 1943.

In paragraph 9, the last paragraph (R. 17) of the first contract dated March 16th, 1943 clearly shows that the contract was intended to be effective irrespective of any court decree. Paragraph 9 (R. 17) reads:

"9. Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under such decree, if entered, it becomes necessary for the plaintiff to obtain the services of any process or paper or notice of any kind upon the defendant, the defendant hereby appoints his attorney,

Mitchell Salem Fisher, Esq. of 30 Pine Street, New York City, as his agent and attorney-in-fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot with reasonable diligence, be found in the City of New York."

It is to be noted that the conjunction "or" in the second line of said paragraph 9 is a disjunctive conjunction and makes the power of attorney effective either under "such decree if entered" or under the stipulation. The notices and affidavits (papers) required to be served by paragraph 6 of the contract (R. 16) were served on the attorney-in-fact named in said paragraph 9 (R. 9), to collect the \$180.00 per month from January 1944 to and including July 1944, long after the entry of the Judgment of Separation on October 13th, 1943 and after the defendant Petitioner, Joseph Estin, had left New York (R. 46, R. 11, R. 78) and Mrs. Estin did collect \$180.00 per month for seven months up to and including July 1944. The attorney-in-fact, Mitchell Salem Fisher and the other trustee named in the contract, Edward C. Morsch, Esq., Mrs. Estin's original attorney of record (R. 1). Both attorneys, Edwin C. Morsch Esq. and Mitchell Salem Fisher Esq. had executed the said contract and modifications thereof together with their respective clients (R. 17, R. 20, R. 22).

The defendant, Petitioner, and his then attorney, Mitchell Salem Fisher, Esq., showed in April 1944 that they considered the aforesaid contract and modifications, one instrument (R. 20 par. 5) to be continuing in effect six months after the Separation was judgment is proved by the letter Mitchell Salem Fisher wrote to the respondent's then attorney (R. 22, Exhibit C) purporting to revoke Joseph

Estin's appointment of Mitchell Salem Fisher Esq. as his agent and attorney-in-fact to receive the service of any process or paper or notice of any kind. If, as Petitioner contends the said contract became a nullity because the Court did not specifically by word approve the contract, then such notice as Mr. Fisher gave (R. 22) was entirely unnecessary.

Mr. Fisher's appointment as Mr. Estin's agent and attorney-in-fact for the purpose stated is a power of attorney coupled with an interest and is irrevocable (R. 62).

A power of attorney to sue a third party on a covenant of which the grantor of the power had agreed that the grantee should have the benefit as security for his indemnity, is a power of attorney coupled with an interest and is irrevocable.

Raymond v. Squire, 11 Johnson's Rep. 47;
Farrell v. Amberg, 8 Misc. 220.

In the Farrell case the above cited case of *Raymond v. Squire* is cited with approval in the opinion of Justice Bishoff in 8 Misc. 220 at page 226.

A power of attorney given to secure the payment of money advanced on a contract is a power coupled with an interest and is irrevocable.

Day v. Candee et al 7 Fed. Cases 231 at page 238 (U. S. Cir. Ct. of Appls 2nd Cir.)

Power of Attorney to receive service of summons for an insurance company writing policies in state other than its home state is irrevocable.

Johnston v. Mut. Res. Life Ins. Co., 45 Misc. 31;
Woodward v. Mut. Res. Life Ins. Co., 178 N. Y. 486.

Because the Separation Agreement contains the phrase (R. 15) "subject to the approval of the court:" the petitioner (R. 27) and his counsel on page 38 of his brief herein urge that, because the official Referee and the Justice who signed the Separation Judgment did not make the contract a part of the judgment they therefore did not approve of it and that therefore upon the entry of the judgment of Separation on October 13th, 1943 the contract ceased to have any force or effect.

Such is not the law of the State of New York. The contract was made in the State of New York by citizens of New York residing in New York as part and parcel of an action at law pending between them in the Supreme Court of the State of New York. The law of New York governs the making and interpretation of the contract.

The official referee received the Contract, in three parts, in evidence, as one exhibit (R. 81, R. 82). That it was received in evidence and marked as an exhibit, and found as a fact (R. 82, 5) "That the plaintiff and the defendant have entered into a separation agreement dated March 16, 1943, as amended by a stipulation dated April 1st, 1943, and further amended by a letter dated April 12th, 1943, all of which have been received in evidence as one exhibit marked Plaintiff's 'Exhibit I' ", conclusively shows that the official referee considered the agreement, in three parts, relative and material evidence in the case and by reference to it in detail accepted and adopted it. By reference and ruling on it in its entirety and making a finding of fact, that it is a separation agreement, he gave it his approval. By its judgment, the court ratified and affirmed and approved the report of the official referee in all respects,

which includes the finding of fact that the contract in question is a separation agreement.

“The practice of incorporating into a final divorce judgment such an agreement as this was condemned in *Kunker v. Kunker*, 230 A. D. 641 in forceful and unmistakable language. The court pointed out that there is nothing in the statute which gives jurisdiction to incorporate into such a judgment the formal private agreements made by the parties as to a division of their property and the like. Its inclusion in the judgment here has accomplished no more than to give rise to a misconception of the real scope of the decree and to consequent unnecessary litigation. The court should not be called upon to separate the agreement into various parts, construe them and determine how much, if any, of the obligations assumed by the defendant should be held to be for alimony and how much for reinstatement of plaintiff in any property rights of which she may have been deprived.”

Schnitzer v. Buerger, 237 App. Div. 625.

Justice Hallinan in Special Term of the Supreme Court in his decision held that the contracts and stipulations between the two parties had been approved and adopted by the referee and the Court (R. 87, R. 88). The Appellate Division by affirming the judgment of Special Term, approved and affirmed Justice Hallinan's ruling.

The Court of Appeals of the State of New York in its opinion (R. 100) must have had the Separation Agreement of these parties in mind and concurred in the views of Justice Hallinan and the Appellate Division when it wrote in its opinion “and in *Jackson v. Jackson*, 290 N. Y. 512, we

held that a court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife."

If that sentence quoted does not apply to the contracts in question between the parties hereto it has no applicability to this case.

There is no question but that in a proper case where the alimony has been explicitly fixed even though by means of an appropriate agreement approved by the Court and embodied in the judgment, the court may alter the amount to a sum which it deems fair to require a defendant to pay toward the support of his wife and children. The power intrusted to the courts by sections 1155 and 1170 of the Civil Practice Act exists none the less where such a direction follows the agreement of the parties (*Kunker v. Kunker*, *supra*; *Holahan v. Holahan*, 234 A. D. 572; *Lowenthal v. Lowenthal*, 229 A. D. 446; *Goldfish v. Goldfish*, 193 A. D. 686; *Staehr v. Staehr*, 237 A. D. 843.

On the other hand, manifestly no power resides in the Court to alter a valid agreement as between the parties who made it and who may declare upon it for relief as upon any other contract."

Schnitzer v. Buerger, 237 A. D. 625.

POINT VI

The District Court in the Second Judicial District of the State of Nevada did not have and could not assume jurisdiction of the subject matter in the divorce action of *Estin v. Estin*.

The Second Judicial District Court of the State of Nevada was barred from hearing, trying and adjudicating the divorce action of *Estin v. Estin*, on May 24th, 1943 by Art. IV, Sec. 1 of the Constitution of the United States and by the act of Congress which implements it, 28 U. S. C. A. sec. 687, which commands that "The records and judicial proceedings of the courts of any State shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment of Separation of the New York Supreme Court, dated October 13th, 1943, was before the Nevada Court in Reno, Washoe County, Nevada on May 24th, 1945, in the pleadings (R. 31) and in the testimony given at the hearing by Joseph Estin (R. 48). The District Court in Nevada found as a matter of fact in its Findings of Fact that said judgment exists (R. 39).

Barber v. Barber, 21 How. (62 U. S.) 582;

Atherton v. Atherton, 181 U. S. 155;

Harding v. Harding, 198 U. S. 317;

Sistare v. Sistare, 218 U. S. 1;

Michigan Trust Co. v. Ferry, 228 U. S. 346;

Grubb v. Public Utilities Comm., 281 U. S. 470,
479;

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430.

In May 1945, when Joseph Estin commenced his divorce action in the Second Judicial District Court in Reno, Nevada, and in the same month when the hearing was had in the same Court, the judgment of Separation of the Supreme Court of New York, Queens County, between the same parties, was a valid binding judgment which could not have been attacked by the defendant either directly or collaterally.

A judgment binding in the State where rendered is equally binding in every state.

Harding v. Harding, 198 U. S. 318 (*supra*);

Williams v. North Carolina, 2nd Appeal, 325 U. S. 226.

A judgment upon the merits in one suit is *res adjudicata* in another under the "full faith and credit" clause, where the parties and the subject matter are the same not only as respects matters actually presented to sustain or defeat the right asserted but also as respects any other available matters which might have been presented to that end.

Grubb v. Pub. Util. Comm., 281 U. S. 470, 479 (*supra*).

As pointed out on page 4 of this brief the judgment of separation and support was granted to the respondent, Gertrude Estin, because of the wilful abandonment of said respondent by the petitioner, Joseph Estin. In the Nevada Court, the plaintiff there, petitioner here, Joseph Estin, was granted a divorce from the defendant there, Gertrude Estin, respondent here, on the grounds of "three years continual separation". No matter what name is applied the facts in both cases are identical.

As appears in the findings of fact of the learned Official Referee attached to the judgment roll in the Queens County, New York, Separation case (R. 81, R. 82) and in the copy of the judgment roll of the Nevada Divorce action (R. 38, R. 39, R. 48, R. 49) Mr. and Mrs. Estin were married at Crown Point, Indiana on July 20th, 1937. They lived together as man and wife in Queens County, New York until April 14th, 1942 when Joseph Estin left his wife, the respondent and their home and has been away ever since.

On October 13th, 1943, the judgment of separation and maintenance, after due personal service of the summons and a copy of the complaint on the defendant, Joseph Estin, petitioner here, in New York City, New York State (R. 12, R. 14), was granted to the plaintiff—respondent Gertrude Estin in the Supreme Court in New York, Queens County, and from that date the separation became legal.

To make up the three years "continual separation" on which grounds the Nevada Court granted the divorce, the first eighteen months from April 14th, 1942 to October 13th, 1943, was the same fact which had been tried and adjudicated in the New York Supreme Court on the same issue between the same parties.

When a state of facts is tried and adjudicated between the same parties on the same issue in a Court having jurisdiction of the parties and the subject matter, the same facts may not be re-adjudicated in another action, whether of the same or a different name, in a court of the same or another state.

Harding v. Harding, 198 U. S. 317 (*supra*);

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (*supra*);

Barber v. Barber, 21 How (62 U. S.) 582 (*supra*).

The above case of *Barber v. Barber* is cited and followed in the above cited case of *Harding v. Harding*. Both cases, *Barber v. Barber* and *Harding v. Harding* are cited and followed in the case of *Magnolia Petroleum Co. v. Hunt* (*supra*). The case of *Harding v. Harding* is cited in the case of *Davis v. Davis*, 305 U. S. 32 at page 41 and the *Davis* case is cited with approval in *Williams v. North Carolina*.

The facts in the case of *Barber v. Barber*, 21 How. 582 (*supra*) which are analagous to the facts in the instant case of *Estin v. Estin* and are briefly as follows:

Mrs. Barber, in 1846, in New York obtained a judgment of divorce from bed and board and for suitable support and maintenance (the modern separation action) and brought suit for arrears in payments for her support and maintenance in the United States District Court for the District of Wisconsin in 1847, to which state the husband had gone, after his wife started her divorce action in New York, in order to avoid making any payments. When Barber went to Wisconsin it was still a territory. After it was admitted to the Union in 1847, as a State, Mr. Barber commenced an action in a Wisconsin State Court, in Dodge County, for absolute divorce *a vinculo* from his wife on the grounds that his wife had wilfully abandoned him. Mrs. Barber was not personally served with the summons and complaint in Wisconsin, was not in Wisconsin and did not appear in the action or answer. In the divorce action in Wisconsin the husband did not disclose the circumstances of the divorce *a mensa et thora* in New York. In the action by Mrs. Barber to collect the arrears of alimony in the United States District Court, Mr. Barber, in his answer set up his Wisconsin divorce and claimed that it superseded and an-

nulled the judgment and decree for support and maintenance. The United States District Court gave judgment for the amount prayed for to Mrs. Barber and (apparently) Mr. Barber appealed to the Supreme Court of the United States.

The United States Supreme Court affirmed the Judgment of the United States District Court and held that a *divorce a vinculo* obtained in Wisconsin and upon the allegation by the husband that the wife had wilfully abandoned him cannot release the husband there and everywhere else from his liability under the decree made against him in New York.

The judgment in New York legalizing the separation precluded the possibility that the same separation could constitute wilful abandonment of the husband by the wife.

The above cited case of *Barber v. Barber* is followed in *Sistare v. Sistare*, 218 U. S. 1; in *Audubon v. Shufeldt*, 181 U. S. 577; in *Barber, Stella v. Barber George*, 323 U. S. 77, 80. It is cited and followed in United States Circuit Courts of Appeal in *Cotter v. Cotter* (C. C. A. 9) 225 Fed. Rep. 471, 475 in *Israel v. Israel* (C. C. A. 3) 148 Fed. Rep. 576; in *Syracuse Trust Co. ex rel. Woodward v. Woodward* (C. C. A. 2, 1947) 173 Fed. Supp. 667, 162 Fed. 2nd 415.

In the *Magnolia Petroleum Co. v. Hunt* case, *supra*, the Court wrote in its opinion:

"Under the full faith and credit 'clause and the Act of Congress implementing it, what has been adjudicated in one State is *res adjudicata* to the same extent in every other State. The purpose of the' full faith and credit 'Clause was to establish throughout the federal system the salutary principle of the common law, that litigation once pursued to judgment

shall be conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other state.

"Because there is a 'full faith and credit' clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery."

The case of *Harding v. Harding* (*supra*) decided in 1904 is cited with approval in *Magnolia Petroleum Co. v. Hunt* (*supra*), decided in 1943 .

Will Joseph Estin, the defendant-Petitioner, be here heard that he a second time has "challenged the validity of his wife's, the respondent's right, which had ripened into a judgment" of separation and maintenance in the New York Supreme Court a year and a half before he commenced his divorce action in Nevada?

The Nevada Court was informed in the trial of the Estin divorce action (R. 31, R. 39, R. 48) and took notice of the separation judgment in this case in the Queens County, New York Supreme Court and brushed it aside (R. 39) as not "*res adjudicata* of the matters alleged in Plaintiff's Complaint."

"State Courts cannot avoid review by the United States Supreme Court of their disposition of a Constitutional claim of casting it in the cover of an un-reviewable finding of fact."

Williams v. North Carolina, 2nd Appeal 352 U. S. 226. The judgment in New York legalizing the separation pre-

cluded the possibility that the same separation could constitute desertion of the husband by the wife.

Barber v. Barber, 21 How. 582 (*supra*)

The Law is the same in New York.

The common law Rule:—"No man shall be twice vexed for one and the same cause"—would seem to be its own interpreter. In order that the rule may be applied with uniform precision, the courts have held that certain entities must concur to make a second action a second vexation. The two actions must have substantially the same parties who sue and defend in each case in the same respective character, the same cause of action, and the same object. The proper test seems to be whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same and the judgment in the former action is a bar to the subsequent action although the two actions are different in form. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties and it has even been designated as infallible.

Lipkind v. Ward, 256 A. D. 74, 78.

The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which were expressly litigated and determined and also to those matters which although not expressly determined are comprehended and involved in the thing expressly stated and decided whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue

should have been taken on the precise point controverted in the second action. Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided.

Reich v. Cochran, 151 N. Y. 122, 127;

Lorrillard v. Clyde, 122 N. Y. 41;

Williamsburg Savings Bank v. Town of Sodom,
136 N. Y. 465;

Pray v. Hegeman, 98 N. Y. 351;

Smith v. Smith, 79 N. Y. 76.

It is the law in Nevada.

Vickers v. Vickers, 45 Nev. 274, 198 Pac. 76, 202,
Pac. 31, 32.

In the *Vickers* case, Mr. and Mrs. Vickers lived in West Virginia. Mrs. Vickers sued there for a separation on the ground of extreme cruelty. Mr. Vickers was in West Virginia, was personally served there with the summons and complaint, appeared in the case in person and by attorney, filed an answer and contested the action. Mrs. Vickers prevailed and got a judgment of separation and alimony for her support and maintenance. Mr. Vickers went to Nevada and in due course sued for divorce on the grounds of extreme cruelty. Mrs. Vickers appeared in person and by attorney in the case and answered. In her answer set up the judgment of the West Virginia Court as a bar to Mr. Vickers' divorce action. The Supreme Court of Nevada held that the prior judgment of separation granted by the West Virginia Court was a bar to the Nevada divorce action and dismissed Mr. Vickers' complaint.

In its decision the Nevada Supreme Court cited and followed the case of *Harding v. Harding*, 198 U. S. 317 (*supra*).

The facts in *Harding v. Harding* are exactly analogous to those in the instant case, *Estin v. Estin*.

Mr. and Mrs. Harding lived, and were married in Illinois. They quarrelled and separated. Mrs. Harding commenced an action for divorce from bed and board in the Circuit Court of Cook County (Chicago) and prayed for judgment for support and maintenance, the kind of action which is defined an action for separation in the New York Civil Practice Act. Mr. Harding appeared in the action and contested it. After trial judgment was given to Mrs. Harding and a decree was entered, allowing her a certain sum of money payable monthly for her separate maintenance, and support. Thereafter, Mr. Harding moved to California and after living there a little over a year to establish a residence under the California statute he commenced an action for divorce from his wife on the grounds of "wilful desertion", which is one of the grounds for divorce under the California Statute. Mrs. Harding appeared in the divorce action and contested it. In her answer denied the allegations of the complaint and the case was tried on its merits. Mr. Harding prevailed and the divorce was granted. Mrs. Harding appealed to the Supreme Court of California, which affirmed the decree. The case came to the United States Supreme Court on error to the Supreme Court of California. In its decision the Supreme Court of the United States held:

"The issues involved in the Illinois case and the California case were practically the same and under the 'full faith and credit' clause of the Constitution, the California Court should have held that the Il-

linois judgment was an estoppel against the assertion of the husband that the wife's living apart from him was through any fault on her part or amounted to desertion. From these conclusions, it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case, it follows that the Supreme Court of California in affirming the judgment of divorce failed to give to the decree of the Illinois Court the due faith and credit to which it is entitled, and thereby violated the Constitution of the United States.

The judgment of the Supreme Court of California must be therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The case of *Atherton v. Atherton*, 181 U. S. 155 (*supra*), is briefly as follows:

Mr. and Mrs. Atherton had their matrimonial domicile in Kentucky which was the domicile of the husband before marriage. They were married in Clinton, Oneida County, New York, where Mrs. Atherton lived before her marriage. After marriage, they at once went to Kentucky and resided there as man and wife. In Kentucky their child was born. Mrs. Atherton left her husband in Kentucky and returned to her mother's home in Clinton, New York, taking their child with her. Mr. Atherton filed a petition against his wife in a Court in Kentucky for a divorce from the bond of matrimony for her abandonment which was a grounds for divorce by the laws of Kentucky; and alleged on oath, as required by the Kentucky Statute that Mrs. Atherton might be found at Clinton, New York. The clerk as required by the Kentucky statute, entered a warning order to the wife to appear in sixty days, and appointed an

attorney-at-law for her. The attorney wrote to her at Clinton N. Y. advising her of the object of the petition, and enclosing a copy thereof in a letter addressed to her, by mail, to that place, and having on the envelope a direction to return it to him, if not delivered in ten days. A month later the attorney, having received no answer made his report to the Court. Five weeks afterward, the Court, after taking evidence, granted the husband an absolute divorce for the wife's abandonment of him. The action was commenced December 28, 1892 and the decree of divorce entered in Kentucky on March 14th, 1893.

While the husband's divorce action was pending in Kentucky, Mrs. Atherton commenced an action in the Supreme Court of New York, Oneida County, for a divorce from bed and board, now defined an action for a separation, on the ground of cruel and abusive treatment of the plaintiff by the defendant on account of which and without fault on her part, she was compelled to leave her husband. The defendant, Mr. Atherton, appeared and answered his wife's action in Oneida County, New York, in June 1893, after his Kentucky divorce had been granted, and in his answer denied the cruelty charged, and set up the decree of divorce from the bond of matrimony obtained by him in Kentucky against his wife as a plea in bar.

The Supreme Court of New York found that the wife was not personally served with process within the State of Kentucky or at all, nor did she in any manner appear or authorize an appearance for her. The Court decided that the decree of the Court in Kentucky was inoperative and void as against the wife and no bar to the New York action; and gave judgment in her favor for a divorce from bed and board and for the support of herself and child.

The judgment was affirmed by the General Term of the Supreme Court of New York (82 Hun 179) and by the Court of Appeals of the State of New York (155 N. Y. 129).

Mr. Atherton applied to the Supreme Court of the United States for a *writ of certiorari* which was granted and after hearing the appeal, the Supreme Court of the United States reversed the judgment of the Court of Appeals of the State of New York and held that the Kentucky Court had jurisdiction to try the divorce action and that its judgment of divorce was a bar to the New York action, under the Constitution of the United States Art. IV, Sec. 1.

The case of *Atherton v. Atherton*, *supra*, was cited with approval and followed in both appeals in the case of *Williams v. North Carolina*.

POINT VII

The doctrine laid down by the New York Court of Appeals in the judgment appealed from is in accord with sound public policy.

Recent decisions of the Federal Courts are in accord with the Opinion of Chief Judge Loughran of the New York Court of Appeals in the case of *Estin v. Estin*.

In the case of *Gray v. Gray*, 61 Fed. Supp. 367 (E. D. Mich. 1945), a husband avoided service in his wife's separation action in the Wayne Co. (Detroit) Michigan State Court by going to Nevada where he obtained a default divorce. Mrs. Gray was not personally served with process within the jurisdiction of the Nevada Court. Mr. Gray later returned to Detroit. His wife received a separation

judgment awarding alimony in the Michigan State Court, and when he refused to pay she obtained a contempt order. Mr. Gray then sued in the United States District Court for the Eastern District of Michigan for an injunction to prevent the enforcement of the contempt order, on the theory that his Nevada decree was a bar. His contention was rejected in an opinion by Picard, D. J.

“A divorce granted according to the laws of Nevada should be given full faith and credit by Michigan courts, although *bona fides* of divorcing party's domicile could be questioned.

“A Michigan State Court could proceed with wife's separate maintenance suit notwithstanding that husband had obtained a Nevada divorce and the Federal Court would not prevent Michigan Courts' contempt order for husband's failure to pay alimony.”

Judge Picard then cites the distinction made by the Supreme Court of the United States in *Williams v. North Carolina*, between the legality of the divorce and the property rights of the parties and cites the cases cited in the case of *Williams v. North Carolina* on this point, among them, *Olmstead v. Olmstead*, 216 U. S. 386 and *Hood v. McGehee*, 237 U. S. 611, Judge Picard notes that the cases cited refer to real property interests only, and then cites the late case of *Price v. Ruggles*, 244 Wis. 187; 11 N. W. 2nd 513, which was decided after the decision in *Williams v. North Carolina*.

Judge Picard writes:

“The Wisconsin decision states that ‘under the circumstances involved, if the divorce in Nevada destroyed the wife's marriage status, she might, upon

personal service upon the former husband, no alimony or dower having been awarded her by the divorce judgment, prosecute a suit in equity for alimony out of his property. It would seem that in this State (Wisconsin) a wife situated as was the first wife might bring an action for alimony even though the husband had no real estate or other property within it. Else a man worth a million dollars in personal property might leave the state, take all his property with him, go to Nevada and get a judgment for divorce after staying there sixty days and thus throw his wife and the burden of her support on the public."

In the case of *Price v. Ruggles*, *supra*, Mrs. Price got her judgment for alimony in the Wisconsin State Court and further got judgment for the arrears in payments of the alimony against the administrator of her husband's estate (he had later died) against the claims of husband's second wife.

Judge Picard writes further in his opinion in the case of *Gray v. Gray* (*supra*):

"Not only is this the view of the Supreme Court of the United States, the Supreme Court of Wisconsin, but the long standing decision governing the position of Michigan Courts was laid down in *Van Ingwagen v. Van Ingwagen*, 86 Mich. 333; 49 N. W. 154, 156, which states as follows: 'the facts set up in the cross bill relative to defendant procuring a divorce in the State of Indiana would not, if true, oust the Circuit Court in Chancery for Hillsdale County of jurisdiction.' "

In 1947, seven months ago, two cases were decided in the Federal Court in the Southern District of New York,

or rather, one case was decided in the United States District Court on May 28th, 1947 and the judgment in the same case was affirmed on Appeal in the United States Circuit Court of Appeals, Second Circuit on July 1st, 1947. In

Security Trust Co. of Rochester, N. Y. v. Woodward and Woodward, District Court of the United States, So. Dis. of N. Y., John Bright, J., 73 Fed. Supp. 667

Mr. and Mrs. Woodward lived and married in New York. They separated and Mrs. Woodward sued in New York for a separation and support for herself and minor son. Mr. Woodward was served personally in New York and appeared and contested the action. Judgment of separation and custody of the minor son was granted to Mrs. Woodward and she was awarded substantial alimony for the support of herself and her son. Mr. Woodward went to Nevada and stayed there sufficient time to acquire a domicile and commenced an action for divorce there against his wife in New York. Mrs. Woodward was not in Nevada, was not served personally within the jurisdiction of the Nevada Court and did not voluntarily place herself within its jurisdiction by appearance in person or by attorney. Woodward removed all of his property and possessions out of New York except the trust funds in the bank of the plaintiff, the Security Trust Co. of Rochester, N. Y. which trust had been sequestered in proceedings started in the Supreme Court of the State of New York to collect her alimony. Woodward undertook, by notice to the Trust Company, to stop payment to her. The Trust Company inter pleaded both Mr. and Mrs. Woodward in the action brought in the United States District Court for the So. District of New York.

Mr. Woodward set up the claim that his Nevada divorce superceded and annulled Mrs. Woodward's Separation judgment and was a bar to her collecting any more alimony from the plaintiff, Trust Co.

On the above facts Judge Bright of the U. S. District Court rejected the husband's contention as unsound and held that the wife was entitled to summary judgment, awarding to her the funds on deposit in the action and entitling her to continue to receive support under the separation judgment regardless of the status of the Nevada divorce as such. His opinion dated May 20, 1947, shows that the law is clear and admits of no doubt, stating:

"As the provisions in New York for alimony were in personam, that portion of the Nevada decree *in rem* did not affect or abrogate the alimony provisions in the New York judgment. The Nevada Court did not have jurisdiction of Mrs. Woodward in personam; she was not served with process in Nevada; she did not submit to jurisdiction there; and her property rights established by a valid judgment (to which also full faith and credit must be accorded), were not affected."

Mr. Woodward appealed and the United States Circuit Court of Appeals consented to hear the appeal without delay on the typewritten record. On July 1st, 1947, the ruling of Judge Bright was unanimously affirmed in a decision reading as follows:

"*Per Curiam*: Affirmed on the authority of *Esenwein v. Esenwein*, 325 U. S. 279; *Estin v. Estin*, 296 N. Y. 308 and *Bassett v. Bassett*, 141 Fed. 2nd. 954 (C. C. A. 9.)" 162 Fed. 2nd 415.

As stated in the opinion of Chief Judge Loughran of the New York Court of Appeals in the instant case (R. 100)

"Counsel have cited no Nevada statute or decision to the contrary nor any Nevada case in which a divorce granted in that State against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the State of her domicile."

The above law as decided by the above cited Federal cases is the law in Ohio; *Manny v. Manny*; 59 N. E. 2nd, 755 (1944) in Wisconsin, as above stated, *Price v. Ruggles*, 244 Wis. 187 (1943) in Iowa; *Bennett v. Tomlinson*, 206 Iowa 1075; 221 N. W. 837 (1928).

"An unmodified judgment in personam in a court of competent jurisdiction of a foreign State which is then the matrimonial jurisdiction of both husband and wife for the maintenance of the wife, payable in monthly instalments is entitled to the protection of 'the full faith and credit' clause under the constitution as to all matured instalments, even though subsequent to the entry of such judgment, the judgment defendant departs from the matrimonial domicile and obtains in this state (Iowa) a naked decree of divorce on service by publication."

Mrs. Bennett obtained her judgment for separation in Illinois. Mr. Bennett afterward went to Iowa and obtained a judgment of divorce from his wife in Illinois on service by publication.

In another Iowa case: *Miller v. Miller*, 200 Iowa 1193, 1201, the Supreme Court of Iowa, held:

"So far as the personal and property rights of the defendant spouse as distinguished from her status are concerned, courts of equity are not wanting either in power or ingenuity to fully protect them within

their territorial jurisdiction, notwithstanding the dissolution of the marriage status by a foreign decree."

It is the law in Idaho.

Simonton v. Simonton (1925), 40 Idaho 751, 42 R. L. R. 1463, 1475, the Supreme Court of Idaho held:

"A subsequent decree of divorce on constructive service does not end husband's obligation under or the enforceability of prior decree for separate maintenance of wife and minor children, where the separate maintenance decree was not modified for court action."

It is the law in Michigan as above stated as established in the case of *Van Ingwagen v. Van Ingwagen*, 86 Mich. 333: 49 N. W. 154. The case cited by Petitioner's counsel on page 34 of his brief *McCullough v. McCullough*, 203 Mich. 288 does not change the rule, the facts are not the same.

It is the law in Arkansas.

Wagster v. Wagster (Arkansas) 103 S. W. 2nd 639.

It is the law in New Jersey.

Bolton v. Bolton, 86 N. J. L. 626. 92 Atl. 391;

Bennett v. Bennett, 63 N. J. Eq. 308.

It is the law in North Carolina.

Arrington v. Arrington, 127 N. C. 195.

In Maryland:

Chappel v. Chappel, 86 Md. 543.

And in Indiana:

Rogers v. Rogers, 46 Ind. App. 509.

The example given by Petitioner's counsel on pages 19 and 20 of his brief does not correctly state the New York Law. If Mr. A. is separated from his wife by a New York judgment decreeing a separation and alimony for Mrs. A. whether Mr. A. leaves New York or stays. If he afterward learns that his wife has committed adultery *one time and can prove it*, he doesn't need to wait until his wife begins proceedings under 1171-b of the New York Civil practice act, he should stop paying alimony and bring an action for divorce in New York on the grounds of adultery. *If he proves* the adultery he will get his divorce and his wife would get no more alimony. But let us continue the example given by the opponent's counsel, supposing that Mr. A. sues for divorce on the grounds of adultery, in Arizona, his wife being served by publication and mailing and not appearing in the case, and gets his divorce. When Mrs. A. starts proceedings to get a money judgment for arrears of alimony under section 1171-b of the New York Civil Practice Act and Mr. A. then comes to New York and instead of opposing the proceedings started by his wife, begins an action in the New York Supreme Court to obtain a declaratory judgment (New York Civil Practice Act, Sec. 473), making his Arizona divorce judgment a judgment of divorce in New York. Because his Arizona divorce is a judgment in rem, Mrs. A. would have the right to come into the New York Court and defend, and Mr. A. would have to prove the adultery of his wife over again. If he did prove it, he would pay his wife no more alimony. Mrs. A.'s proceedings under 1171-b would be stayed pending the trial of Mr. A.'s action upon showing by Mr. A. of the probability of his success.

The cases cited by Chief Judge Loughran in his opinion in the instant case (R. 99) are authority for this.

If the contention of the petitioner were well founded in law and the judgment of the New York Court of Appeals in the case of *Estin v. Estin* were reversed, there are thousands of men all across the country, separated from their wives by Separation or Limited Divorce Judgments and paying them alimony pursuant to the same judgments who would at once betake themselves to a State of quick divorce and there sue for divorce on the ground of "three years separation", or some other grounds and get the divorce and then be forever free of supporting their wives. *Such is not the law.*

CONCLUSION

For the above reasons, respondent respectfully submits that the judgment of the Court of Appeals of the State of New York be affirmed and that the judgment of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe dated May 24th, 1945 (R. 40, R. 41) in the case of Joseph Estin, plaintiff vs. Gertrude Estin, defendant, by which an absolute divorce from the defendant was granted to the plaintiff be declared void and invalid, and that the respondent should be granted such other relief as may be proper in the premises and be awarded the proper costs pursuant to statute and the rules of this Court, and in this particular that consideration be given to the expenses and damages sustained by the respondent in opposing the petition for a Writ of Certiorari herein and in opposing the petition for a Rehearing of the Petition for a Writ of Certiorari.

Respectfully submitted,

ROY GUTHMAN,
Counsel for Respondent.

FILE COPY

Supreme Court,
FILED

DEC 15 1947

CHARLES H. HARRIS
CLERK

Supreme Court of the United States

OCTOBER 1947 TERM.

JOSEPH ESTIN,
Petitioner,

AGAINST

GERTRUDE ESTIN,
Respondent.

No. 139.

**Petition for Leave to File a Petition for a Rehearing of
Petitioner's Petition for Writ of Certiorari to the
Court of Appeals of the State of New York, and Peti-
tion for Such Rehearing.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your Petitioner respectfully prays that he be granted permission to file a Petition for a rehearing of the decision made by this Court on the 13th day of October, 1947, denying his Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

**Reason for Filing This Petition for Leave to File a
Petition for a Rehearing.**

The 25 days allowed by Rule 33 of the Rules of this Court expired on the 8th day of November, 1947, and hence the Petition for a rehearing may be filed only with leave of this Court.

**Reason Why the Petition for a Rehearing of the Decision
of This Court Made October 1947 Should Be
Permitted to Be Filed.**

This Court on November 24th, 1947, granted a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York in *Kreiger v. Kreiger*, No. 371, October Term 1947, which presented the same question of constitutional law as does this cause.

The Petition herein presented to this Court the question as to whether the Court of Appeals of the State of New York erred in holding that the provisions for support of the respondent included in the judgment of separation entered in the New York Supreme Court was not superseded by the subsequent valid divorce decree obtained by the petitioner against the respondent in the State of Nevada. The New York Court of Appeals held that, as the respondent here had not been personally served with process within the jurisdiction of the Nevada Court and had not appeared in said action, her rights to alimony under the New York Separation Decree had not been affected, and that the obligation of the Petitioner to pay the moneys provided in said separation decree continued notwithstanding that the petitioner had obtained a valid divorce in Nevada, and that Article IV, Section 1, of the United States Constitution did not require a different decision. This Court denied the Petition for a Writ of Certiorari to the said Court of Appeals of the State of New York on October 13, 1947.

While the Petition for a Writ of Certiorari was pending before this Court, counsel for the Petitioner herein, on the 26th day of September, 1947, filed with this Court in the said *Kreiger* case a Petition to review the judgment of the Court of Appeals of the State of New York upon a similar state of facts, and presenting the same question of constitutional law. In *Kreiger v. Kreiger* the New

York Court of Appeals had affirmed a judgment for arrears of alimony granted by the Supreme Court of the State of New York accruing under a separation decree subsequent to the date on which Mr. Kreiger obtained his valid divorce in Nevada upon the same method of service of process. The Court of Appeals in *Kreiger v. Kreiger* wrote no opinion, but in its remittitur stated that it was affirmed "on the authority of *Estin v. Estin* (296 N. Y. 308)," and this Court, on the 24th day of November, 1947, granted Mr. Kreiger's Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Inasmuch as the questions of constitutional law presented by the record in *Kreiger v. Kreiger* are identical with the questions of law presented in *Estin v. Estin*, we believe that justice to Mr. Estin warrants a Writ of Certiorari to the Court of Appeals of the State of New York in this case as well as in the case of *Kreiger v. Kreiger*.

Should this Court in *Kreiger v. Kreiger* reverse the judgment of the Court of Appeals of the State of New York upon the ground that full faith and credit to Mr. Kreiger's divorce decree in Nevada compelled a recognition by the New York Courts that the alimony provisions of the separation decree of the New York Supreme Court had been superseded by the divorce decree in Nevada, and that Mr. Kreiger was not liable for any alimony payments accruing after the entry of his divorce decree in that state, it would be most unjust and illogical to leave Mr. Estin, who is legally in the same situation, obligated to continue to pay the alimony awarded by the separation judgment obtained by Mrs. Estin.

It would be proper, we believe, that both causes be argued together.

WHEREFORE your Petitioner prays:

1. That he be granted permission to file a Petition for a rehearing of the Petition for a Writ of Certiorari to

the Court of Appeals of the State of New York in this cause;

2. That the order denying said petition, made the 13th day of October, 1947, be vacated;

3. That this Petition be considered a Petition for such rehearing and be received as such;

4. That upon such rehearing the prayer of the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York, as set forth in his original Petition as filed herein, be granted; and

5. That petitioner have such other relief as may be just.

Respectfully submitted,

JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

We do hereby certify that this Petition is presented in good faith, and not for delay, and that said Petition is restricted to the grounds therein set forth.

JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

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Office - Supreme Court, N. Y.

FILED

DEC 13 1947

CHARLES ELMOKE GROFFEN
CLERK

IN THE
Supreme Court of the United States

OCTOBER, 1947 TERM.

No. 139.

JOSEPH ESTIN,

Petitioner,

against

GERTRUDE ESTIN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A REHEARING OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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↓
JOSEPH N. SCHULTZ,
Of Counsel.

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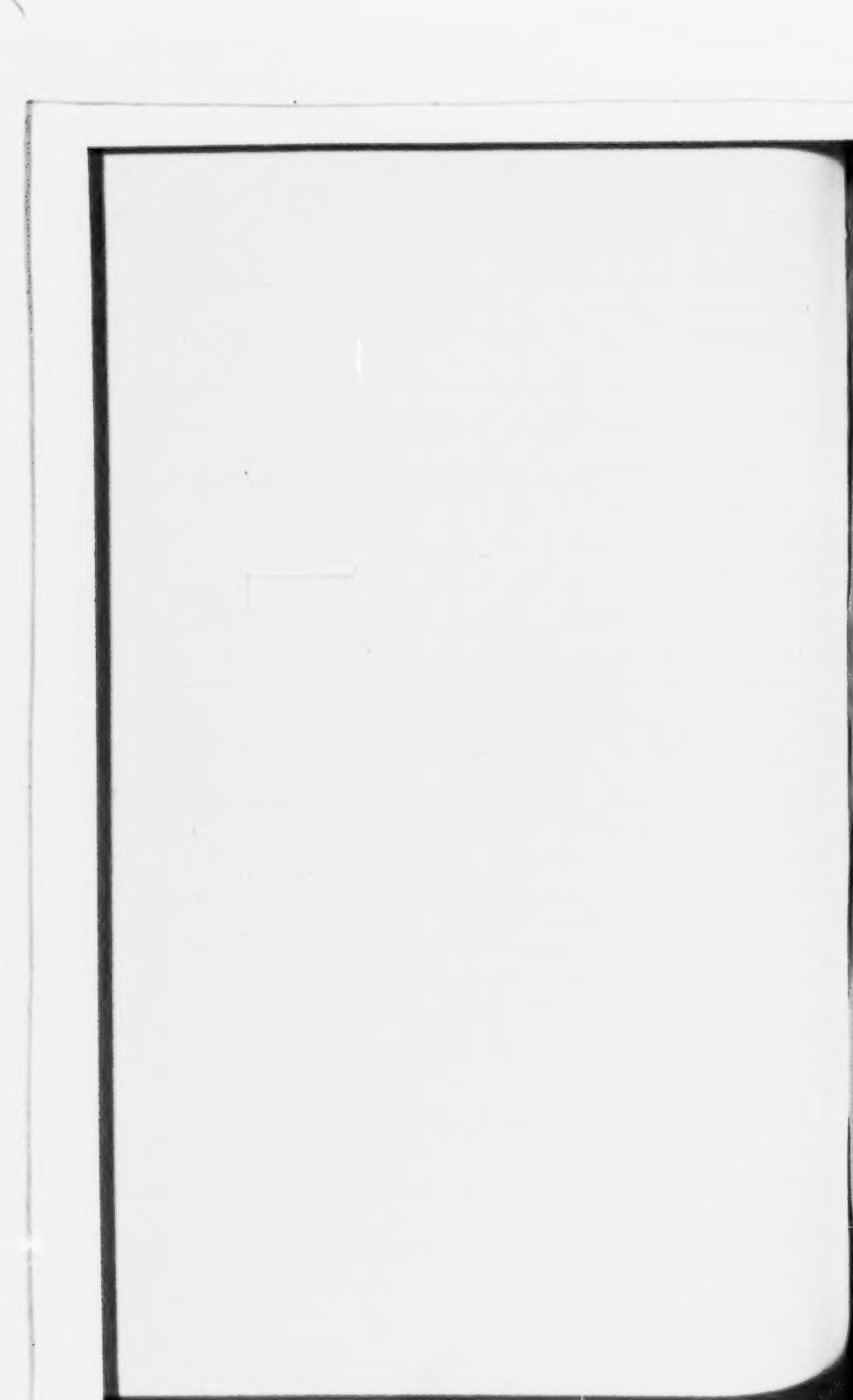
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Supreme Court of the United States

OCTOBER, 1947 TERM.

No. 139.

JOSEPH ESTIN,

Petitioner,

against

GERTRUDE ESTIN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION OF THE PETITIONER FOR A REHEARING OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND IN OPPOSITION TO THE PETITION FOR SUCH REHEARING

Statement

By Order dated October 13th, 1947, this Honorable Court denied the Petitioner's Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Fifty-one days had elapsed before the Petitioner served a copy of his Petition for a Rehearing on Respondent's attorney, twenty-six days after the last day allowed by Rule 33 of this Court for the filing of such petition.

The reason given for the delay is the decision of this Honorable Court on November 24th, 1947 in granting a Writ of Certiorari to the New York Court of Appeals in the case of *Kreiger v. Kreiger*, No. 371, October Term 1947.

No reason is given for the wait and delay from November 24th, 1947 to December 6th, 1947. The four page Petition, which Petitioner's Counsel served, shows no further research, and certainly no great time or study was required to compose it.

The respondent, Mrs. Gertrude Estin, is damaged and hampered by the delay. She has not received any money from the Petitioner since May 1945 (R. 15, R. 77). There is due and owing to her the amount of the present judgment appealed from herein, \$2,441.90 with interest and costs (R. 11) and in addition a second judgment for arrears of alimony which have accrued since the entry of the aforesaid judgment appealed from, which second judgment in the amount of \$2,650.50 was entered in the Supreme Court of New York, Queens County, on the 25th day of September 1947. The Petitioner herein, defendant below, has stated that he would fight the respondent to the end (R. 119).

Mrs. Estin works as a secretary for an Insurance Agency in Wall Street, New York (R. 69), at a salary of \$40.00 per week to support herself. The fact of the amount of her earnings is not in the record before the Court but is well known to the Petitioner's Counsel and to the Petitioner and is established by at least two affidavits on file in the County Clerk's Office in Queens County, New York, in the files of this case. Her salary affords her a bare living and her counsel in this case has been paid by allowances of counsel fees which the Court has ordered the petitioner, her husband, to pay (R. 10) and other allowances which the Court has made by orders entered after the record before this Honorable Court was made up and therefore do not appear in the record.

The Order denying Petitioner's Petition for a Writ of Certiorari herein, on October 13th, 1947, did not contain an allowance of costs to the Respondent to pay her damages occasioned by the filing of said Petition. She was put to an expense of \$100.00 to print the briefs which were filed in opposition to the Petition for a Writ of Certiorari. The Respondent thinks that she is entitled to such an allowance of costs pursuant to Section 352, Chapter 9, Title 28 of the United States Code.

Notwithstanding the statement of Counsel for the Petitioner on page 2 of his brief, first paragraph, the case of *Estin v. Estin*, now under consideration does not present the same question of constitutional law as was presented in the case of *Kreiger v. Kreiger*, No. 371 October Term, 1947 and the questions of law presented by the record in the said case of *Kreiger v. Kreiger* are not *identical* with the questions of law presented by the record in this case, *Estin v. Estin*.

In opposing the Petition for a Writ of Certiorari in the case of *Kreiger v. Kreiger*, the counsel for Mrs. Kreiger did not follow or comply with rule 27, par. 4 of the Rules of the Supreme Court of the United States, or with Rule 38, par. 3. It is possible that failure to comply with these rules may have been the reason for the granting of the Writ of Certiorari (2nd paragraph of Rule 38).

Notwithstanding the statement of Petitioner's Counsel in his brief, page 2 thereof, second paragraph, Joseph Estin's divorce decree which he obtained in Reno, Nevada in May 1945, is *not valid*. It appears on the face of the record before this Honorable Court that the identically same testimony was heard in the Separation Action of

Gertrude Estin against Joseph Estein in the Supreme Court of New York in Queens County in May 1943, which lead to the judgment herein on October 13th, 1943, as was heard in the divorce action in Reno, Nevada in May 1945, between the identically same parties, Joseph Estein, plaintiff, vs. Gertrude Estin, defendant; that they were married at Crown Point, Indiana, on July 20th, 1937; that they lived together as man and wife in New York City for more than five years prior to the hearing in the separation action in the New York Supreme Court on October 13th, 1943; that Joseph Estin, the defendant in New York, plaintiff in Reno and Petitioner here wilfully left the home of himself and his wife in Queens County, New York and never returned; that there is no issue of said marriage (R. 127; R. 62; R. 63; R. 76; R. 77). In the two actions there was no more, other or different testimony, except that in the Nevada divorce action there was evidence as to Joseph Estin's movements *after* the entry of the Judgment of Separation in Queens County, New York, on October 13th, 1943, to show that Mr. Estein subsequently to that date left New York and became a domiciliary of Washoe County, Nevada.

The testimony as to material facts of the essence of both causes of action is identical.

In the first action, the New York Supreme Court gave Mrs. Estin a Separation and \$180.00 per month maintenance; in the second action, eighteen months later, the Reno, Nevada, District Court gave Mr. Estin an absolute divorce.

Mr. Estin was personally served with the summons and complaint in the Separation Action, in New York County, within the jurisdiction of the Court (R. 20), and a certified

copy of the judgment of Separation and maintenance was personally served on him on October 27th, 1943 (R. 22).

Mrs. Estin was not personally served with the summons and complaint in the Divorce Action, within the jurisdiction of the Nevada Court; she was not served in Nevada. She was served by publication and by personal service of copies of the summons and complaint in New York County, New York (R. 55-R. 60).

There is a valid, existing, adjudicated separation agreement between the parties hereto which gives to Gertrude Estin the contract right to collect \$180.00 per month for her maintenance (R. 23-R. 36; R. 127; R. 21).

Argument

I. There is no statement in the Petition for a rehearing that the decision of this Honorable Court, denying the Writ of Certiorari was improvident or in what particular it was not just. There is not a statement in the Petition for rehearing to show how or in what particular the decision of this Honorable Court in granting the Writ of Certiorari in the case of *Kreiger v. Kreiger* was inconsistent with the decision of this Honorable Court in denying the petition for a Writ of Certiorari in the instance case of *Estin v. Estin*.

Southern Power Co. v. North Carolina Pub. Serv. Co., 263, U. S. 508.

II. No constitutional issue is raised by the petition herein either in form or substance.

III. The issue the petitioner attempts to raise has been resolved repeatedly by the decisions of this Honorable Court.

For the argument on Points II and III counsel respectfully refers to his brief filed herein on or about July 28th, 1947 in opposition to Petitioner's application for a Writ of Certiorari, of which the Petitioner is now asking a rehearing.

In the record in the case of *Kreiger v. Kreiger*, there is no separation agreement. There had been one which the judgment of separation and maintenance granted to Mrs. Kreiger by the New York Supreme Court, voided for fraud on the part of Mr. Kreiger.

There is no question and it has not been claimed anywhere in the trial of this action or in the arguments in the Courts below that a judgment of divorce by default in which action the defendant has not been personally served with the summons and complaint has any effect upon or can annul any contract rights which the defendant has against the plaintiff.

This point was not in the Kreiger case.

The New York Court of Appeals in its decision, had in mind Mrs. Estein's Separation Agreement and that Mr. Estin's Nevada divorce had no effect on it (R. 162) for it cites:

"A Court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by a wife."

Jackson v. Jackson, 290 N. Y. 512.

The Supreme Court of New York in Queens County, gave to the respondent, plaintiff below, a judgment of Separation and maintenance because of proof that the parties lived apart, that the defendant, petitioner here, wilfully abandoned her from April 14th, 1942 to October 13th, 1943, the date of the judgment and after, a period of eighteen months, with intention of not returning. The District Court in Washoe County, Nevada, on identical testimony as above pointed out, gave the petitioner, plaintiff there, defendant in the New York Court, a divorce from the respondent, defendant in the Nevada Court, plaintiff in the New York Courts, because of continuous separation for three years from April 14th, 1942 to May 24th, 1945, which included the same 18 months separation for which the New York Supreme Court, Queens County, had given the respondent, defendant in Nevada, a prior judgment of Separation and maintenance against the petitioner.

"The judgment in New York legalizing the separation precluded the possibility that the same separation could constitute wilful desertion (living apart) of the husband by the wife."

Barber v. Barber, 21 How. (62 U. S.) 582.

"The final decree entered in the Circuit Court in Cook County, Illinois, in legal effect established that the separation then existing was lawful and therefore conclusively operated to prevent the same desertion from constituting a wilful desertion by the wife of the husband."

Harding v. Harding, 198 U. S. 317.

The judgment of Separation and maintenance herein given to Gertrude Estin, the respondent, by the Supreme

Court of New York in Queens County on October 13th, 1947 was and is conclusive of the rights of the parties here and in every other court including the District Court in Washoe County, Nevada.

“Under ‘the full faith and credit’ clause and the Act of Congress implementing it, what has been adjudicated in one State is *res adjudicata* to the same extent in every other State. The purpose of the ‘full faith and credit’ clause was to establish throughout the federal system the salutary principle of the common law, that litigation once pursued to judgment shall be conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other state.

“Because there is a ‘full faith and credit’ clause a defendant may not a second time challenge the validity of the plaintiff’s right which has ripened into judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.”

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430;
Forsyth v. Hammond, 166 U. S. 506, 509.

This is the Law in New York.

Lorrillard v. Clyde, 122 N. Y. 41;
Williamsburgh Savings Bank v. Town of Solon,
 136 N. Y. 465;
Pray v. Hegeman, 98 N. Y. 351;
Smith v. Smith, 79 N. Y. 76.

It is the law in Nevada.

Vickers v. Vickers, 45 Nev. 274, 202 Pac. 31.

This point has been vehemently urged by the respondent's counsel in the arguments in this proceeding (R. 133, fol. 399). The Appellate Division of the Supreme Court of New York, Second Department, affirmed the judgment of the Court below without opinion.

This point does not occur in the case of Kreiger v. Kreiger.

Nowhere in the record in the latter case does it appear or is it claimed that Mr. Kreiger's Nevada divorce is not valid.

The Court of Appeals of the State of New York in its opinion assumed, for the purpose of its decision, the Divorce Judgment of the Nevada Court to be valid and gave to the Nevada decree "full faith and credit" to so much of the Nevada decree as pronounced the dissolution of the marriage (R. 159). It gave to the Nevada decree all of the faith and credit which a Nevada Court could give to it and then held and adjudged that Gertrude Estin's judgment and separation agreement are vested rights of property which a default judgment in rem in an action for divorce only, in a case in which she was not personally served with the summons and complaint within the jurisdiction of the court could not and did not affect, supercede or annul. This is the law in New York.

Livingston v. Livingston, 173 N. Y. 377;

Harris v. Harris, 259 N. Y. 334;

Waddy v. Waddy, 290 N. Y. 247.

It is the law in the United States.

Lynde v. Lynde, 181 U. S. 183;

Sistare v. Sistare, 218 U. S. 1;

Barber, Stella v. Barber, George, 323 U. S. 77.

In his Petition for Rehearing, Petitioner's Counsel in his brief in support thereof, has not followed or complied with Rules 27 and 38 of the Rules of the Supreme Court of the United States.

Southern Power Co. v. N. C. Pub. Service Co.,
263 U. S. 508;
Magnum Import Co. v. Coty, 262 U. S. 159, 163;
Furness Withy Co. v. Yang Tze Ins. Assn., 242
U. S. 430.

WHEREFORE the Respondent prays that the Petition for a Rehearing of the decision of this Honorable Court dated October 13th, 1947, dismissing the Petitioner's application for a Writ of Certiorari to the Court of Appeals of the State of New York, be denied:

That upon such denial the respondent be awarded costs to defray her expenses for printing briefs and opposing the petition; and

That the petitioner have such other and further relief as may be just.

Dated: New York, N. Y., December 11, 1947.

ROY GUTHMAN,
Attorney for Respondent.

JOSEPH N. SCHULTZ,
Of Counsel.